154 U.S. 494

EXHIBIT—CASE No. 15,337.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 30.

ROBERT F. ASPLEY, PLAINTIFF IN ERROR,

vs.

J. P. MURPHY ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.



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a UNITED STATES OF AMERICA,
Fifth Judicial District.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, in the court-room of said court, in the city of New Orleans, State of Louisiana, on the third Monday of November, 1891.

Present and presiding: The Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida, and the Honorable E. E. Billings, United States district judge for the eastern district of Louisiana.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error.

Be it remembered that on the 28th day of March, 1892, the transcript of the record in the above-stated cause, on writ of error from the circuit court of the United States for the northern district of Texas, was filed in said United States circuit court of appeals for the fifth circuit, and is in the words and figures following, to wit:

1 *Caption.*

Be it remembered, that at a term of the circuit court of the United States in the fifth circuit thereof and in and for the northern district of Texas, at Dallas, begun and holden at Dallas, Texas, on the 11th day of January, 1892, and which term is not yet adjourned but still in session, the Hon. Thomas S. Maxey, United States district judge for the western district of Texas, presiding by virtue of the following appointment and designation, from February 15th, 1892, up to February 25th, 1892, to wit:

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Whereas, in my judgment, as circuit judge of the fifth judicial circuit aforesaid, from the urgency and accumulation of business in the northern district of Texas, the public interests require the designation and appointment of some other judge of the circuit in aid of the judge of the aforesaid northern district of Texas; and, particularly, to attend at the January term, 1892, of the circuit court in said district for the disposition of causes there pending, in which the judge of said northern district is recused:

Now, therefore, I, Don A. Pardee, circuit judge of the fifth judicial circuit, do hereby designate and appoint the Hon. T. S. Maxey, judge of the western district of Texas, in aid of the Hon. Andrew P. McCormick, judge of the northern district of Texas, to have and

exercise within the said northern district of Texas, the same powers that are vested in the judge thereof, as provided in sections 592 and 596, Revised Statutes of the United States.

2 Witness my hand as circuit judge aforesaid, at New Orleans, in said circuit, this 11th day of February, A. D. 1892.

DON A. PARDEE,
Circuit Judge.

Filed and entered February 15, 1892.

3 The following proceedings were had and the following cause came on for trial and was tried, to wit:

Style of Cause.

R. F. ASPLEY
vs. } 1390, C.
J. P. MURPHY *et al.*

4 *Plaintiff's Original Petition.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

UNITED STATES OF AMERICA,
Northern District of Texas.

To the honorable the judges of the circuit court of the United States in and for the northern district of Texas, holding sessions at Dallas, Texas:

Robert F. Aspley, complaining of C. A. Keating, G. M. Danover, L. D. Douglas, J. M. Harry, D. C. Harry, W. H. Prather, A. C. Ardrey, Guy Sumpter, G. M. Swink, J. P. Murphy, Chas. F. Bolanz, J. E. Henderson, G. H. Langsdale, Mrs. Josie Motley, D. H. Morrow, Thomas W. Scollard, J. M. Hays, Henry Hamilton, Eugene Sweeney, Mrs. Barbara Nies, Nat. M. Burford, R. L. Burford, Jeff. M. Burford, Mary Burford, Mrs. Mattie B. Freeman and her husband W. M. Freeman, Maria Humphreys, Cherry Jackson and Chas. Boyer, respectfully represents that the plaintiff Robert F. Aspley resides in and is a citizen of the county of Miller, State of Arkansas, and all of the above-named defendants, except the defendants G. H. Langsdale and Mrs. Josie Motley, reside in and are citizens of the county of Dallas, State of Texas, in said northern district of Texas; and that defendant G. H. Langsdale resides in and is a citizen of the county of Bowie, State of Texas, in said eastern district of

5 Texas; and that the defendant Mrs. Josie Motley resides in and is a citizen of the county of Henderson, State of Texas, in said eastern district of Texas;

That the defendants Jeff. M. Burford and Mary Burford, are minors under the age of twenty-one years, and are the children of the defendant Nat. M. Burford and his deceased wife Mary Burford;

That on the first day of January, A. D. 1890, plaintiff was the owner of, and was lawfully seized and possessed of, and entitled to

the possession of, an undivided two-ninths interest in and to the tract of land hereinafter described, situated in said county of Dallas, State of Texas, in said northern district of Texas, holding the same in fee simple;

That on the day and year last aforesaid, the defendants entered upon said premises and ejected plaintiff therefrom, and unlawfully withhold from plaintiff the possession thereof, and of every part and of every interest therein, to his damage one hundred thousand dollars;

That the premises so entered upon and unlawfully withheld by the defendants from the plaintiff as aforesaid, are bounded and described as follows: Part of the John Grigsby league and labor survey, and known as block No. 77 in the city Dallas, according to Murphy and Bolanz's official map of said city, and as block No. 122 in Smith, Murphy & Martin's addition to said city of Dallas, a map of which addition is on record in the office of the county clerk of said Dallas county; and said block is bounded on the north by Main street, on the east by Ervay street, on the west by Akard street formerly Sycamore street, and on the south by Commerce street, all in said city of Dallas; and is of the total value of one million dollars;

That the yearly rental value of said premises is fifty thousand
6 dollars, the whole of which the defendants have received and appropriated, and are receiving and appropriating to their own exclusive use and benefit, to the damage of plaintiff in the sum of five thousand, five hundred and fifty-five dollars per annum.

Wherefore, plaintiff prays that the defendants be cited to answer this petition, and on trial hereof that plaintiff have judgment for the title, and for the restitution of his said undivided interest in the above-described premises, and for his damages, rents and costs of suit.

CHAS. I. EVANS,
G. J. GOOCH,
Att'ys for Pltf., R. F. Aspley.

The foregoing has the following endorsement, to wit:

No. 1390. United States circuit court, northern district of Texas. Robert F. Aspley *vs.* C. A. Keating, *et al.* Plaintiff's original petition. Filed June 11, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

This action is brought as well to try title as for damages. Chas. I. Evans and G. J Gooch, pl'ff's att'ys.

7 1*st Original Amended Answer.*

In Circuit Court of the United States.

R. F. ASPLEY
vs.
C. A. KEATING *et al.*

And now come the defendants G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, J. P. Murphy, Chas. F. Bolanz, G. H. Langs-

dale, Josie R. Motley, D. H. Morrow, Thos. W. Scollard, Henry Hamilton, Barbara Neis, Cherry Jackson and Abe Ashe, who makes himself a party defendant, and with leave of the court first had and obtained amend their answer heretofore filed on the 11th day of January, 1892, and say—

That the said G. M. Danover and the said L. D. Douglas disclaim any right, title and interest in the block of land described in plaintiff's petition, in their individual names and capacity, as sued for, but that the said G. M. Danover and the said L. D. Douglas say that as a firm under the name of Douglas & Danover they do own and hold title in their firm name to the east ½ of lot No. 3, in block No. 122, described in plaintiff's petition; which said lot is more particularly described hereinafter. That further than this, they disclaim any interest in said block sued for and ask to be dismissed with their costs.

And the said J. P. Murphy and Chas. F. Bolanz, specially answering for themselves say that as a firm under the style and name of Murphy and Bolanz, they claim and own title to lots 1, 2 in said block; beginning at the southwest corner of Main and Ervay and running west 100 feet with the south line of Main street, then
8 running back at right angles with said street 100 feet; also that as such partnership they own and hold title to lot No. 28 and the west half of lot No. 27 in said block. That said lot No. 28 begins at the northwest corner of Commerce and Ervay streets, running west with the line of Commerce street 50 feet, thence at right angles from said street 100 feet. That the west half of lot No. 27 begins 75 feet from the corner of Commerce and Ervay as above described, running west with the north line of Ervay street 25 feet on Commerce street and running back at right angles from said Commerce street 100 feet. That they own each an undivided half interest in lots 26*th*, the east half of lot 25, and the east half of lot 27. That the east half of lot 27 begins 50 feet from the southwest corner of Commerce and Ervay street- and running 25 feet west with the line of Commerce street, thence at right angles with said street 100 feet. That lot 26 and ½ of lot 25 is described as follows: Beginning at 100 feet from the southwest corner of Commerce and Ervay streets, thence west 75 feet on the line of Commerce street, thence at right angles from said street 100 feet.

That further than this the said J. P. Murphy and Chas. F. Bolanz disclaim all right, title and interest in and to the block sued for in plaintiff's petition.

And the defendants further answering, each for himself, say, that they disclaim all right, title and interest in block No. 77, formerly known as block 122, of Smith, Murphy & Martin's addition to Dallas, as set forth in said petition, except as to the respective portions and lots in said blocks owned and claimed by each respectively and more particularly described as follows:
9 The defendants J. P. Murphy and Chas. F. Bolanz claim as above stated. The defendants G. M. Danover and L. D. Douglas claim as a firm as above stated the E. ½ of lot No. 3, fronting on Main street 25 feet and running back 100 feet, said lot beginning

100 feet from the northwest corner of Main and Ervay street-, thence west on the line of said Main street 25 feet, thence running back at right angles from said main street 100 feet.

And the defendant Henry Hamilton claims and holds title to the W. ½ of lot No. 3, fronting on Main street 25 feet and running back 100 feet from said street; said lot being west — and adjoining the lot of Douglas & Danover.

And the defendant G. H. Langsdale claims and owns title to the whole of lot No. 7, in said block, fronting 51½ feet on Main street and running back at right angles from said street.

And the defendant Thos. W. Scollard claims and holds title to lot No. 8 in said block, fronting 55 feet on Main street and extending back at right angles 100 feet.

And the defendants J. M. Harry and D. C. Harry each claim and hold title to lots No. 11 and 21 feet off the east half of lot No. 12, fronting 71 feet on Main street and extending back at right angles from said street 100 feet. Each of the said defendants owning a one-half undivided interest in said property.

And the defendant Mrs. Barbara Neis claims and holds title to lots 15, 16 and 17 in said block, fronting 150 feet on Commerce street and extending back at right angles from said street 100 feet.

And the defendant Mrs. Josie Motley claims and holds title to 12 feet off the east half of lot 19, and 13 feet off the west half of lot 20, the said lot fronting 25 feet on Commerce street and extending back at right angles from said street 100 feet.

And the defendant D. H. Morrow claims and owns title to lot 18, beginning at the southeast corner of the B. Neis lot extending east 37½ feet fronting on Commerce street and running back at right angles 100 feet.

And the defendant Abe Ash claims and holds title to all of lot 21 in said block, fronting fifty feet on Commerce street and running back at right angles from said street 100 feet.

And the defendant Mrs. J. R. Motley claims lot No. 22 in said block fronting 50 feet on Commerce street and running back at right angles with said street 100 feet.

And the defendant Cherry Jackson claims lots 21 and 22 in said block, fronting 50 feet on Commerce — and running back at right angles with said street 100 feet.

But all of which several divisions and claims will more fully appear, reference being had to the diagram hereto attached, marked "Exhibit A," and made a part of this plea. And defendants pray that in their answers hereinafter set forth reference be had to this plea for a description of the respective interests claimed by each of the aforesaid —.

And the defendants answering, each for himself, say that they deny all and singular the allegations in plaintiff's petition, and of this they put themselves upon the country.

And defendants further answering, each for himself, say that they are not guilty of the wrongs and trespasses alleged against them in said petition, and of this they put themselves upon the country.

And these defendants further answering, each for himself, say that

they and those under whom they claim have had peaceable,
11 adverse, continuous and exclusive possession of the respective portions of said block as above described, holding and claiming their respective portions for more than three years next before the commencement of this suit, and said peaceable, continuous, uninterrupted and exclusive possession has been held from and under the State of Texas.

And these defendants further answering say, each for himself, that they and those under whom they claim, have had peaceable, adverse, continuous and exclusive possession of the respective portions and lots above described, under deeds duly registered, cultivating, using and enjoying the same and paying all taxes due thereon for a period of more than five years next before the commencement of this suit, and this they are ready to verify.

And these defendants further answering, each for himself, say that they and those under whom they claim, have had and held peaceable, continuous, exclusive and adverse possession to the respective portions of said block as above set forth, cultivating, using and enjoying the same for a period of more than ten years prior to the institution of this suit, and this they are ready to verify.

And the said Douglass & Danover, further answering for themselves, come and suggest to the court that they and those whose estate they have in the portion of said block owned and claimed by them as above set forth, have had adverse possession to same for more than one year next before the commencement of this suit, and that they and those whose estate they have as aforesaid, have made permanent and valuable improvements of the value of three thousand dollars on the aforesaid land and premises during the time they and those whose estate they have as aforesaid, have had
12 such possession, and this they are ready to verify; therefore they pray judgment for the value of their improvements as aforesaid.

And the said T. W. Scollard, further answering for himself, comes and suggests to the court that he has had adverse possession in good faith of the lots in said block mentioned above for more than one year next before the commencement of this suit, and that he has made permanent and valuable improvements of the sum of $60,000 on the aforesaid premises during the time he has had such possession, and asks the judgment of the court for the value of the improvements.

And the said Murphy & Bolanz, further answering, in their individual and firm capacity suggests to the court that they and those whose estate they have in the lots in said block as above set forth have had adverse possession of same in good faith for more than one year next before the commencement of this suit, and that they and those whose estate they have have made permanent and valuable improvements on said land and premises of the value of $5,000 during the time that they and those whose estate they have as aforesaid have had such possession, and they pray the court for the value of the improvements.

And the said B. Neis, further answering for herself, says that she

nd those whose estate she has in the lots in said block sued for and more particularly described above, have had adverse possession of the same in good faith for more than one year next before the commencement of this suit and that she and those whose estate she has have made permanent and valuable improvements on said lots of the value of $5,000 during the time said possession has been held as aforesaid; wherefore she prays judgment for the value of the improvements.

13 And the said J. M. Harry and D. C. Harry, each answering for themselves, suggest to the court that they and those whose estate they have in and to the lots as above described have had adverse possession of said lots in good faith for more than one year next before the commencement of this suit, and that they and those whose estate they have during said possession have made permanent and valuable improvements of the value of $12,000 on the aforesaid premises; wherefore they pray judgment for the value of the said improvements.

And the said D. H. Morrow further answering for himself, suggests that he and those whose estate he has in the lots in said block sued for described above, have had adverse possession of said lots for more than one year next before the commencement of said suit, and that he and those whose estate he has, has made on said land during the time such possession was held, permanent and valuable improvement- of $2,000, and wherefore he prays judgment for the value of his improvements.

SIMPKINS & MORROW,
For Defendants Above Named.

The foregoing has the following endorsement, to wit:
R. F. Aspley *vs.* C. A. Keating, *et al.* No. 1390. 1st original amended answer. Filed Jan. 15, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Simpkins & Morrow.

(Here follows diagram marked p. 13½.)

14 *Amended Motion to Sever.*

In U. S. Circuit Court, Dallas County.

J. P. MURPHY *et al.*
vs.
R. F. ASPLEY.

And now comes defendants G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, J. P. Murphy, Chas. F. Bolanz, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Barbara Neis, Cherry Jackson and Abe Ash and Eugene Sweeney and show unto your honor that one R. F. Aspley on the 11th day of June, A. D. 1891, filed his petition in a cause entitled R. F. Aspley *vs.* C. A. Keating *et al.*, numbered —; that said suit was instituted to try title to block No. 77, formerly 122, in the city

of Dallas, and the following-named parties were made defendants, to wit: All of the above-named defendants together with W. H. Prather, A. C. Ardrey, Guy Sumpter, G. M. Swink, J. E. Henderson, J. M. Haynes, Eugene Sweeney, N. M. Burford, R. L. Burford, Jeff. M. Burford, Mary Burford, Mattie B. Freeman, W. M. Freeman, Maria Humphreys and Chas. Boyer.

Petitioners show unto your honor that the interests held by each *as* several and that said interest is not in any manner joined with the last-named defendants.

That a trial can be had at law and their respective interests wholly determined without prejudice to the alleged rights of plaintiff or the last-named defendants.

Premises considered, plaintiff prays for a severance from the defendants named and that the cause be docketed, as severed, for trial in due course of law.

SIMKINS & MORROW,
For Petitioners.

15 The foregoing has the following endorsement, to wit:

1390. J. P. Murphy *et al. vs.* R. F. Aspley. Amended motion to sever. Filed Jan. 15, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

16 *Order.*

ROBERT F. ASPLEY
vs.
C. A. KEATING *et al.* } 1390.

FEBRUARY 17, 1892.

On this day came regularly on to be heard the application of the defendants G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, J. P. Murphy, Chas. F. Bolanz, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Barbara Neis, Cherry Jackson, Abe Ashe and Eugene Sweeney for a severance in the above entitled and numbered cause and the court having heard and considered same is of the opinion that same should be granted.

It is therefore ordered and adjudged by the court that as to the defendants hereinabove named this cause be tried separately from the other defendants in said cause and the clerk of this court is hereby ordered to docket and number said cause as to said defendants herein named separately, styling same as follows: No. 1390, C. Robert F. Aspley *vs.* J. P. Murphy *et al.*

17 *Judgment.*

ROBERT F. ASPLEY
vs.
J. P. MURPHY *et al.* } 1390, C.

FEBRUARY 20, 1892.

On February 17, 1892, this cause being regularly called, came the plaintiff, R. F. Aspley, by attorney, and announced ready; came

also the defendants, L. D. Douglass, G. M. Danover, J. M. Harry, D. C. Harry, J. P. Murphy, Chas. F. Bolanz, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Barbara Neis, Cherry Jackson, Abe Ashe and Eugene Sweeney, by their attorneys, and announced ready; then came a jury of twelve good and lawful men, to wit:

R. L. Johnson,	R. A. Barrow,	L. C. McCallum,
S. B. Baker,	E. L. Bell,	J. M. Brown,
M. C. Glenn,	W. Decker,	W. C. Williams,
R. H. Hodge,	Henry Hardee,	A. J. Dukes,

who were duly and legally selected, empaneled and sworn to try this cause; and the jury, having heard the pleadings, evidence, argument of counsel and charge of the court, retired to consider of their verdict, and thereafter, on February 20, 1892, returned into open court the following verdict, to wit:

"We, the jury, find for the defendants.

"W. DECKER, *Foreman.*"

It is therefore considered by the court, and it is so ordered and adjudged, that the said plaintiff, R. F. Aspley, take nothing by his action herein as against the above-named defendants, and
18 that said defendants go hence without day and have and recover of and from said plaintiff and the sureties on his cost bond filed herein, Wm. H. Garretson, H. H. Smith and B. Blankenship, all costs by them herein incurred and expended, for which execution may issue.

19 *Plaintiff's Motion for New Trial.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Tex.

R. F. ASPLEY *vs* J. P. MURPHY *et al.* } 1390, C.

Now comes the plaintiff R. F. Aspley by his attorneys, and moves the court to set aside the verdict and judgment in this cause, and to grant him a new trial, for the following reasons, to wit:

1. The court erred in overruling the plaintiff's objections to, and *and* admitting in evidence over the objections of the plaintiff, the certified copy of the decree of the probate court of Houston county, Texas, dated March 29, 1847, decreeing specific performance of the pretended contract between John Grigsby and Crawford Grigsby, and directing Balis Edens, the administrator of the estate of John Grigsby, dec'd, to make a conveyance to the heirs of Crawford Grigsby for 1,000 acres of land, and all the proceedings of said probate court, subsequent thereto and based thereon, including said administrator's deed, because—

a. Said probate court, at said time, did not have jurisdiction to make said decree or order;

b. Said record of said probate court shows upon its face
20 that said court did not have jurisdiction to make said order or decree;

c. Said probate record does not show upon its face that said court did have jurisdiction to make said order or decree;

d. Said order or decree vests in the estate of Crawford Grigsby, if of any validity at all, an equitable right or title to an undivided interest to the extent of 1,000 acres in the John Grigsby league and labor survey, as tenant in common with the estate of John Grigsby, which is not a legal title and cannot avail the defendants in this case.

2. The court erred in admitting in evidence over the objections of the *of the* plaintiff, the deed of conveyance from Balis Edens, administrator of the estate of John Grigsby, dec'd, to William Grigsby, executor of the estate of Crawford Grigsby, dec'd, dated July 17, 1847, and purporting to have been made in compliance with said order, because said deed does not conform to nor comply with said decree of March 29, 1847, in this: that said deed attempts to convey a specific tract of 1,000 acres of land, by metes and bounds, whereas said decree only authorized the administrator to convey an undivided interest of 1,000 acres, third choice, in the whole John Grigsby league and labor survey.

3. The court erred in admitting — evidence over the objection of the plaintiff, the deed of conveyance from William Grigsby, executor of the estate of Crawford Grigsby, dec'd, to the several devi-ees of Crawford Grigsby, dated — day of ——, because the same appears upon its face not to have been duly and legally registered, in this: that it was not legally and properly authenticated for record, it having been proved for record by a subscribing witness before John Grigs-
21 by, clerk of the county court of Anderson county, Texas, who was one of the devisees of Crawford Grigsby, one of the grantees in said deed, and therefore directly interested in said deed.

4. The court erred in directing the jury to return a verdict for the defendants.

CHAS. I. EVANS & G. J. GOOCH AND
BASSETT, SEAY & MUSE,
For the Plaintiff.

The foregoing has the following endorsement, to wit:

No. 1390, C. R. F. Aspley *vs.* J. P. Murphy *et al.* Plaintiff's motion for new trial. Filed Feb. 22, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

22 *Order Overruling Motion.*

R. F. Aspley
vs.
J. P. Murphy *et al.* } 1390, C.

February 23, 1892.

On this day came on to be heard the motion of the plaintiff for a new trial herein, and the court having heard said motion, the argu-

ment of counsel thereon, and having given the same due consideration, is of the opinion that the law is against the motion, and orders that it be and it is hereby overruled and refused.

23 *Plaintiff's Bill of Exceptions.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

R. F. ASPLEY
vs.
J. P. MURPHY *et al.* } 1390, C.

Be it remembered that on a trial of the above entitled and numbered cause in the circuit court of the United States for the northern district of Texas, the following proceedings were had, viz:

It was proved that the survey of one league and labor of land, of which the land described in plaintiff's petition is a part, was patented to John Grigsby by the Republic of Texas, by letter- patent No. 17, vol. 2, dated January 28, 1842.

That when John Grigsby immigrated to Texas from Illinois, he was married to his second wife, Louisa, and then had seven children by a former marriage. That he died intestate in the early part of the year 1841, leaving surviving him his widow Louisa, and seven children by his first marriage, and two by his last marriage. That the names of his seven children by his first marriage were Crawford, Elizabeth, Ruth Ann, William, John, James and Robert H.; that

24 the names of his two children by his second wife, Louisa, were Emeline and Daniel B. That about a year after the death of John Grigsby his surviving widow married Balis Edens, and died in June, 1843, leaving one child by Edens, whose name is Maria Louisa, at present the wife of C. C. Swindle. That in the early part of the year 1844, Balis Edens married Ruth Ann, the daughter of John Grigsby by his first wife.

That Elizabeth Grigsby, daughter of John Grigsby by his first wife, married first a man named Mitchell and afterwards married M. P. Mead.

That Emeline Grigsby, the daughter of John Grigsby by his second wife, Louisa, married L. G. Aspley on the 24th day of February, 1854, and died intestate November 7, 1868, leaving surviving her her said husband, and one son, Robert F. Aspley, the plaintiff in this cause, who was born December 11, 1854.

That on the 6th day of November, 1888, L. G. Aspley, the surviving husband of Emeline Aspley, formerly Grigsby, conveyed by deed to his son, R. F. Aspley, the plaintiff, all his interest in the John Grigsby league and labor survey of land, including his life estate in one-third of his deceased wife's interest therein. That the thousand-acre tract of land hereinafter referred to, in the probate proceedings put in evidence by the defendants, as "the Crawford Grigsby 1,000 acres," is a part of the John Grigsby league and labor survey; and the land described in the plaintiff's petition is also a

part of said Crawford Grigsby 1,000-acre tract; and that said 1,000-acre tract was never partitioned as a part of John Grigsby's estate, but was partitioned as a part of Crawford Grigsby's estate.

That when Crawford Grigsby died he left a will, devising the whole of his estate to his six brothers and sisters of the whole
25 blood, one of whom was Ruth Ann Grigsby, the second wife of Balis Edens; and that his brother and sister of the half blood were excluded.

That the defendants offered in evidence the following certified copies of the proceedings of the probate court of Houston county, Texas, in the course of the administration on the estate of John Grigsby, deceased, to wit:

A Transcript of all the Proceedings had in the Probate Court of Houston County in Relation to the Estate of John Grigsby, Deceased.

1841, July Term.

Ordered by the court that letters of administration be granted to Lucinda Grigsby and Crawford Grigsby on the estate of John Grigsby, deceased, after they having given bond and security for the faithful discharge of said duties and taking the oath prescribed by law.

Further ordered by the court that Martin Murchisen, William T. Sadler and Reuben Brown be appointed appraisers to appraise and examine the property belonging to said estate, and after them being duly sworn to perform said trust, and they will be required to make due return thereof with a corresponding certificate thereof to the clerk of this court.

August Term.

Ordered by the court on petition of Crawford Grigsby and Lucinda Grigsby, deceased, that the said administrators proceed and sell all of the perishable property belonging to said estate.

October Term.

The bill of sale returned of the estate of John Grigsby, dec'd, by Crawford Grigsby amount- total fourteen hundred and ten & $\frac{69}{100}$ dollars.

26 1842, September Term.

Ordered by the court that Crawford Grigsby be allowed until the November term of the probate court to make settlement of his accounts as administrator of the estate of John Grigsby, deceased.

1843, July Term.

Ordered by the court that letters of administration upon the estate of John Grigsby be granted Balis Edens upon his giving bond and qualified according to law.

1844, August Term.

Ordered by the court that Balis Edens, adm'r of the estate of John Grigsby, dec'd, be allowed, and he is hereby authorized and required, to make a title to seven hundred and thirty-three and a half acres of land to John Denson, his heirs or assigns, in compliance with a bond given by John Grigsby in his lifetime on the eighth day of February, 1841, to Thomas J. McKee, and transferred by said McKee to said Denson, his heirs or assigns, dated May 6, 1842.

1845, January Term.

Ordered by the court that the exhibit of Balis Edens, adm'r of the estate of John Grigsby, deceased, be received and placed on file and that the said adm'r be allowed the further term of two years to settle up said estate and close up the administration of the some.

1846, February Term.

Whereas, proof having been made that a certain title bond was executed by John Grigsby, dec'd, in his lifetime, and in the
27 year A. D. 1837, made to James Madden, dec'd, for two hundred acres of land, it being a part of the headright of said John Grigsby, dec'd, (the said land to be of an average quality) and it having been also proved to the satisfaction of the court that said bond was destroyed by fire in the year 1838, it is therefore ordered, adjudged and decreed by the court, that the administrator of said John Grigsby, dec'd, do make and execute a title for said land as above described, to the heirs of James Madden, dec'd.

1847, March Term.

Whereas, proof having been made in writing to the satisfaction of the court, that John Grigsby, during his lifetime and about the year 1840 or 1841 made and entered into a contract with Crawford Grigsby to locate and survey one league and labor of land, for which service the said John Grigsby agreed to execute a title to the said Crawford Grigsby for one thousand acres of land out of said league and labor, to be third choice in said league; and said Crawford Grigsby having performed said service of locating and surveying agreeably to contract, and the said John Grigsby never having executed a title for the one thousand acres of land during his lifetime to said Crawford Grigsby (who is now also dead): Therefore it is ordered by the court that Balis Edens, adm'r of the estate of John Grigsby, dec'd, be and he is hereby authorized and required to make a deed to the heirs of Crawford Grigsby, dec'd, for one thousand acres of land agreeably to the contract as proven.

May Term.

Ordered by the court that Balis Edens, administrator of the estate of John Grigsby, dec'd, be allowed to amend his exhibit filed
28 at the January term, 1845, of this court, as follows: After the word standing in said exhibit that he interline the word "established."

July Term.

BAYLIS EDENS, Adm'r of John Grigsby, Dec'd, } Petition for Final
vs. } Settlement.
ESTATE OF JOHN GRIGSBY. }

Continued until next term.

September Term.

Whereas, Balis Edens, administrator of the estate of John Grigsby, dec'd, appeared in open court and presented his accounts for inspection and allowance and final settlement, and legal notice having been served upon all heirs of said estate to attend at said settlement, and contest if they thought proper, after examination of the exhibit and vouchers, the court charges the said Balis Edens, administrator as aforesaid, with the following amounts, to wit:

To gross amount of indebtedness as per the exhibit ...		$6,333 65
And the court allows the said Balis Edens, as administrator as aforesaid, the following credits, to wit:		
By real and personal property returned to the court	$4,748 175	
By total amount of land disposed of in course of administration.....	891 825	
By moneys paid out (as per vouchers) together with the commissions on the amounts received and disbursed	515 825	
Total amount of credits.....		6,155 825
Balance against administrator.....		$177 825

29 Ordered by the court that Balis Edens, adm'r as aforesaid, be allowed the sum of fifty dollars for his services in dividing said estate, and that he retain the balance of the above amount in his hands to defray the expenses in surveying and dividing the lands belonging to said estate.

Ordered by the court that John Parker, Sr., Benjamin Parker and Reuben Brown, be and they are hereby appointed appraisers to appraise 155½ acres of land situated in Shelby county, 200 acres of land in Anderson county, 2 lots in Crockett, one lot in Fort Houston, one note on Thomas J. McKee for $38.40, due bill on William McDonald, $10.00, eight per cent. bond on the Republic of Texas, certificate of services as assessor of Shelby county of $175.00, receipts on government for $100.00, note on T. & R. R. Wiggins for $35.66, note on Jesse Terry for fifty bushels of corn, said property belonging to the estate of John Grigsby, dec'd, and due return thereof make to the next term of this court.

November Term.

BALIS EDENS, Adm'r of John Grigsby, Dec'd,
vs.
SAID ESTATE.

In this case the parties failing to appear the court entertained no action on the petition.

HEIRS OF JOHN GRIGSBY, Dec'd,
vs.
ESTATE OF JOHN GRIGSBY. } Petition for Removal.

The county court having considered the petition for re-
30 moval, etc., it is therefore ordered and decreed by the court that the administration of the estate of John Grigsby, dec'd, together with all the original papers thereto belonging and a complete transcript of all the proceedings in the probate court of Houston county, be transmitted to the probate court of Anderson county.

STATE OF TEXAS,
Houston County.

I, J. H. Gillespie, clerk of the county court and *ex officio* probate clerk of said county, do hereby certify that the above and foregoing is a true transcript of all the proceedings had in the probate court of Houston county, in relation to the estate of John Grigsby, dec'd.

Witness my hand and seal of office at Crockett, this 17th day of December, 1847.

[L. S.]

J. H. GILLESPIE,
Probate Clerk, Houston County.

Filed in my office Jan. 31, 1848.

JOHN GRIGSBY,
C. P. C., A. C.

I hereby certify that the within transcript is duly entered upon the minutes of the probate court of Anderson county.

Witness my hand this the 24th of Feb., A. D. 1848.

JOHN GRIGSBY,
C'l'k Pro. C't, A. C.

To the honorable the probate cort John Grigsby dying without awill it is nesary tha somebody shod administer the undersind will aply at the next cort to be appointed administratrix this the 17th of May 1841.

her
LOUISA x GRIGSBY.
mark.

31 Mr. Jacob Allbright.

SIR:—You will issue the notice required by law.

E. GOSSETT,
Judge of Probate.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C't, A. C.

Recorded in General Record Book, page 148.

J. H. GILLISPIE,
C. P. C., H. Co.

REPUBLIC OF TEXAS, }
County of Houston. }

JULY 26TH, A. D. 1841.

Know all men by these presents, that I, Lusinda Grigsby & Crawford Grigsby of the county and republic as aforesaid, as principals and William T. Sadler and James Maden as sureties, are jointly and firmly held and bound unto Eliga Gossett, chief justice of said county and his successors in office in sum of ten thousand dollars for the payment of said sume wel and truly to be made we bind hour selves and hour hars and assigns.

Now the conditions of the above bond is such, that if the above-bound Lucinda Grigsby & Crawford Grigsby shal wel and faithfully discharge thare duties as administrator and administratrix one the estate of John Grigsby deseast according to law the and in that case the above bound is to remain in ful forse in law in testimony whereof we have hur unto set hour hands and seals day and date as aforesaid.

her
LOUISA x GRIGSBY. [L. S.]
mark.
CRAWFORD GRIGSBY. [L. S.]
JAMES MADDEN. [L. S.]
WILLIAM T. SADDER. [L. S.]

32 Attest:

I approve of the within this 26 July, 1841.

E. GOSSETT,
Judge of Probate.

Filed 26th day July, A. D. 1841.

J. H. GILLESPIE,
Dep. Clerk.

Recorded in General Record Book, pages 148 & 149.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C'k P. C't, A. C.

REPUBLIC OF TEXAS, }
Houston County. }

In accordance with a commission to us directed by the honorable probate court of Houston county, we have examined and appraised the property of which John Grigsby died seized and possessed.

Land lying in Houston county two hundred acres.....	$600 00
Shelby county 255½ acres.....	765 00
Nacogdoches county 2,124 acres..... ...	2,124 00
Do. do. 440 do.	440 00
Two town lots in the town of Crockett.....	20 00

REPUBLIC OF TEXAS, }
Houston County. }

Personally appeared before me, S. E. Kenaday, justice of the peace for said county, Martin Murchison, Reuben Brown and William T. Sadler, and being duly sworn deposeth and saith that the within is a true appraisement of the property of which said John Grigsby died seized and possessed to the best of their knowledge.

MARTIN MURCHISON.
his
REUBEN x BROWN.
mark.
WILLIAM T. SADLER.

33 Sworn and subscribed to before me this 21st of August, 1841.

S. E. KENNEDY (*J. P.*).

Rec'd for record August 30, 1841.

J. H. GILLESPIE,
Dep. Pro. Clk.

Recorded in General Record Book, pages 149 & 150.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
Clk P. C't, A. C.

CROCKETT, 8 *July*, 1843.

The honorable judge of probate court, Houston county:

The undersigned your petitioner, respectfully begs leave to represent that whereas, by the deceased of Crawford Grigsby administrator and Louisa Edens administratrix of the estate of John Grigsby, dec'd, the administratorship of said estate has become vacant, your petitioner humbly prays your honor will grant him letters of administration on said estate according to law &c. and your petitioner will ever pray.

BALIS EDENS.

The clerk will give notice as the law directs.
July 8, 1843.

E. GOSSETT,
Judge of Probate.

Filed July 8, 1843.

C. H. NELSON,
Dep. C. C., H. Co.

3—30

Recorded in General Record Book, page 154.

J. H. GILLESPIE,
C. P., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C't, A. C.

34 REPUBLIC OF TEXAS, }
Houston County. }

Know all men by these presents, that I Balis Edens, principal and James Madden and D. H. Edens securities, are held and firmly bound unto Elijah Gossett, judge of probate for the county aforesaid and to his successors in office in the penal sum of one thousand dollars for the true payment of which we bind ourselves our heirs and assigns firmly by these presents, this thirty-first of July, 1843.

The conditions of the above obligation *is* such, whereas the above-bound Balis Edens has been duly appointed to succeed Crawford Grigsby, dec'd, and Louisa Edens, dec'd, in the administration of the estate of John Grigsby, dec'd, now, if the said Balis Edens shall well and truly perform all the duties that are or may be required of him as such administrator, the above obligation to be void otherwise to remain in full force, in witness whereof we set our hands and seals the day and year above.

BALIS EDENS. [—.]
JAMES MADDEN. [—.]
D. H. EDENS. [—.]

August 4, 1843, I approve of the above bond and security.

E. GOSSETT,
Judge of Probate.

Filed Aug. 4th, 1843.

C. H. NELSON,
Dep. P. C., H. Co.

Recorded in Book A, probate records of Houston county, page 39. Witness my hand and seal of office.

J. H. NELSON,
Dep. C., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C't, A. C.

35 REPUBLIC OF TEXAS, }
County of Houston, }

Probate Court, Jan. Term, 1845.

To the Honorable C. H. Randolph, judge of probate:

Balis Edens, administrator of the estate and succession of John Grigsby, deceased, begs leave to present the following exhibit of his administration of said succession, and of the state and standing thereof. This exhibitant was appointed administrator *de bonis non*

of said succession at say the July term of your hon. court 1843; upon his appointment he found that administration had been originally granted in 1841 to Crawford and Louisa Grigsby both since deceased. He also found that his said predecessors had filed an inventory and appraisement of the property of said succession, and also a return of sales by which it appears that they had sold all the perishable property belonging to said succession except one field of corn which appears to have been divided equally between all the heirs of said succession. This exhibitant will now proceed to give a true and perfect inventory of all and singular the goods, chattels, lands and credits which have come to his possession with the appraisement annexed, to wit:

Bond on John McCoy for 200 acres of land in Houston, appraised at		$600 00
1.	Bond on Wm. Brittain for 255½ acres in Shelby county appraised at	765 00
1.	League and labor of land in Nacogdoches county (patented) subject to the claim of Thos. J. McKee or assigns who holds a bond against deceased for 733½ acres for which this accountant has been ordered by your honorable court to make a title to Jno. Denson or assigns, the whole of said league and labor	
36	having been appraised at	2,124 00
	640 acres of land in Nacogdoches Co. surveyed but not patented valued	440 00
Commissioner's bond for two town lots in Crockett appraised at		20 00
1	house and lot in the town of Ft. Houston which has not been valued.	

This accountant represents that said estate is solvent and that there are no outstanding claims established against it except those noted in this account. Accountant shows that from the unsettled state of the lands claims in favor of and against said estate, a considerable length of time will be necessary for the complete administration thereon, wherefore he prays that his said administration may be continued two years longer and that the charges and com. herein contained be allowed him.

BALIS EDENS,
Administrator John Grigsby, Dec'd.

Sworn to and subscribed in open court January term 1843.
CHARLES H. NELSON, *C. C. C.*

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
Clk Pro C't, A. C.

STATE OF TEXAS, }
County of Houston. }

Probate Court, May Term, 1847.

To the Hon. C. C. Hall, judge of the probate court of said county:

The petition of Balis Edens, administrator of the estate of John Grigsby, dec'd, would respectfully present this his exhibit of his transaction with said estate since his last exhibit rendered January term 1845, agreeable to an order of your hon. court passed at
37 the January term, 1847, calling upon administrators, etc., to render exhibits.

This exhibit- charges himself with the amount of the inventory filed with and appended to his last exhibit rendered Jan. term, 1845, to wit	$5,467 94
5. This exhibitant charges the following sum for extraordinary services rendered going to and returning from Dallas county for the purpose of seeing the condition of the lands belonging to said estate situated in said county and for the purpose of making a first choice in order to execute a title ~~to a~~ second-choice portion of said land to John Denson or assigns as ordered by your hon. court, distance about 300 miles	30 00
Visit to Shelby county on business of said estate	15 00
Time and expenses in obtaining land patent for estate	10 00
6. This exhibitant claims a credit for 733½ acres of land, a part of the headright survey of said John Grigsby, dec'd, appropriated to the satisfaction of a certain bond as per order of your hon. court Aug. term, 1844, vou. 7.	338 32
7. Also 200 acres appropriated to the satisfaction of a claim in favor of estate — Madden as per order of your hon. court, Feb. term, 1846, vou. 8	92 25
8. This exhibitant also claims a credit for 1,000 acres of land appropriated to satisfy a claim in favor of the heirs of Crawford Grigsby, as per order of your
38 hon. court March term, 1847, vou. 9	461 25
The balance of the league and labor valued at $2,124.00 remains on hand 2,671½ acres	1,232 18
The 640-acre tract is on hand	440 00
The land held by bond on McCoy remains as it was 255½ acres	765 00
The lots held by bond in Crockett are titled and remain on hand	20 00
Lots in Fort Houston on hand	

This exhibitant begs leave to represent to your hon. court that there are trespass occupants on a portion of the land belonging to said estate in Dallas county and as a suit may be necessary your petitioner prays that his said administration be continued until the *the* September term of your hon. court and that the charges and commissions herein contained — allowed him.

Personally appeared Balis Edens administrator of John Grigsby, dec'd, who being duly sworn upon his oath says that the above and foregoing exhibit is true.

BALIS EDENS,
Adm'r of John Grigsby.

Sworn to in open court 1st June, 1847.

J. H. GILLESPIE,
Clk P. C't,
By his deputy, J. M. HALL.

Filed 1st June, 1847.

J. H. GILLESPIE, *C. P. C't.*

Recorded in General Record Book, pages 161, 162, 163, 164 & 165.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed in my office Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C., A. C.

39 REPUBLIC OF TEXAS, }
Houston County, }

Probate Court, Aug., 1844.

Ordered by the court that Balis Edens, adm'r of the estate of John Grigsby, dec'd, be allowed and he is hereby authorized & required to make a title to seven hundred and thirty-three & ½ acres of land to John Denson, his heirs or assigns, in compliance with a bond given by John Grigsby in his lifetime on the eighth day of Febr'y, 1841, to Thos. J. McKee, and transferred by said McKee to said Denson, his heirs or assigns, dated May 6, 1842.

A true copy.

Witness my hand & seal of office at Crockett this 28th Sept., 1846.

J. H. GILLESPIE,
[L. S.] *Clk P. C't.*

This is to certify that Balis Edens, administrator of John Grigsby, has executed a title to me the assignee of John Denson in compliance with the within order, this the 29th day of March, 1847.

Filed 28 Sept., 1847.

J. H. GILLESPIE, *C. P. C't.*

Voucher 8.

STATE OF TEXAS, }
County of Houston. }

Probate Court, Feb. Term, 1846.

Whereas, proof having been made that a certain title bond was executed by John Grigsby, dec'd, in his lifetime, and in the year A. D. 1837, made to James Madden dec'd for two hundred acres of

land, it being a part of the headright of said John Grigsby, dec'd, the said land to be of an average quality, and it having also been proved to the satisfaction of the court that said bond was destroyed by fire in the year A. D. 1838; it is therefore ordered and adjudged and decreed by the court, that administrator of said John Grigsby, dec'd, *to* make and execute a title to said land as above described, to the heirs of James Madden, dec'd.

A true copy from the minutes.

Witness my hand and seal of office at Crockett this 2nd of March, 1846.

J. H. GILLESPIE,
[L. S.] *Clk Probate Court.*

This is to certify that I have executed a title to the heirs of James Madden in compliance with the within orders.

BALIS EDENS, *Adm'r.*

Filed Sept. 28th, 1847.

J. H. GILLESPIE, *C. P. C.*

Recorded in General Record Book, page 179.

J. H. GILLESPIE,
C. P. C., H. Co.

THE STATE OF TEXAS, }
Houston County. }

Probate Court, Feb. Term, 1847.

To the Hon. Chas. Hall, judge of probate of the county aforesaid:

The undersigned administrator of the estate of John Grigsby, dec'd, begs leave to represent to the hon. court that said John Grigsby during his lifetime and about the year 1840 or '41 (eighteen hundred and forty or forty-one) did employ his son Crawford Grigsby, since dec'd, to make a selection and locate his, the said John Grigsby's, headright certificate, calling for one league and labor of land for which service the said John Grigsby agreed to give said Crawford Grigsby one thousand acres of land out of said league and labor, said thousand acres to be third-choice land, and also to locate a land warrant belonging to John *John* Grigsby and calling for six hundred and forty acres of land granted to James A. Sylvester for services in the armies of Texas, for the location of which the said John Grigsby agreed to give said Crawford Grigsby two hundred acres of land out of said six hundred and forty acres, to be average quality, your petitioner respectfully represents to your hon. court that the said Crawford Grigsby did faithfully perform his duty in locating the above-named land according to contract, and that the said Crawford Grigsby, dec'd, nor his heirs have ever received the land or any other compensation for making the afore-mentioned location. Therefore, your petitioner respectfully prays your hon. court that he be allowed and required to execute titles to the heirs of Crawford Grigsby in compliance with the afore-

mentioned agreement; your petitioner as in duty bound will ever pray.

BALIS EDENS,
Administrator of the Estate of John Grigsby.

This petition is granted for the one thousand acres as per contract proved 29 March, 1847.

C. C. HALL,
Probate Judge.

Filed 29 March, 1847.

J. H. GILLESPIE, *C. P. C't.*

Recorded in General Record Book, pages 159 & 160.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C'k P. C't, A. C.

Personally appeared William Grigsby, who being duly sworn says he is of — own knowledge knowing to a contract in the lifetime between his father and his brother as follows: Crawford
42 Grigsby engaged with his father to locate and survey one league and labor of land for which service he was to have out of it one thousand acres third choice that his -nowing that Crawford Grigsby performed said labor and in the lifetime of his father who has never made a deed to Crawford Grigsby.

Sworn to and subscribed before — to the best of his knowledge and belief.

WILLIAM GRIGSBY.

J. H. GILLESPIE, *C'k P. C't.*

Filed 29 March, 1847.

J. H. GILLESPIE, *C. P. C't.*

Recorded in General Record Book, page 159.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C., A. Co.

STATE OF TEXAS, }
Houston County. }

Probate Court, March Term, 1847.

Whereas proof having been made in writing to the satisfaction of the court that John Grigsby during his lifetime and about the year 1840 or 1841, made and entered into a contract with Crawford Grigsby to locate and survey one league and labor of land for which service the said John Grigsby agreed to execute a title to the said Crawford Grigsby for one thousand acres of land out of said league and labor to be third choice in said league, and the said Crawford

Grigsby having performed said service of locating and surveying agreeable to contract and the said John Grigsby never having executed a title for the one thousand acres of land during his lifetime to said Crawford Grigsby (who now is also dead),

43 Therefore, it is ordered by the court that Balis Edens, administrator of the estate of John Grigsby, dec'd, be and he is hereby authorized and required to make a deed to the heirs of Crawford Grigsby, dec'd, for one thousand acres of land, agreeably to the contract as proven.

(A true copy.)

Witness my hand and seal of office at Crockett 19 April, 1847.

[L. S.] J. H. GILLESPIE,
Clk Co. Ct, H. Co.

This is to certify that I have rec'd a title of Balis Edens, adm'r of John Grigsby, executed by him in compliance with the within order.

CRAWFORD GRIGSBY,
Ex'r of —.

Filed 28th Sept., 1847.

J. H. GILLESPIE, *C. P. C.*

Recorded in General Record Book, page 180.

J. H. GILLESPIE,
C. P. C., H. Co.

STATE OF TEXAS,)
Houston County.)

Probate Court, May Term, 1847.

To the Honorable Charles C. Hall, judge of the probate court for said county:

Balis Edens, administrator of the estate of John Grigsby, dec'd, begs leave to represent to your hon. court that he will present his account of his said administration of said estate at the July term, 1847, of your hon. court for final settlement and partition.

Therefore your petitioner prays that citation be issued for the following-named persons, requiring them to attend said settlement at said July term, 1847, and show why said partition of said estate shall not be made if there be any, to wit:

Heirs of John Grigsby, William Grigsby, heir and guard-
44 ian of James Grigsby and Robert H. Grigsby. Elizabeth Mead, heir wife of M. P. Mead. Ruth Ann Edens, heir wife of Balis Edens, John Grigsby, heir Balis Edens, guardian of Dan. B. and Emeline Grigsby.

The above-named persons being all the heirs — representatives of heirs of the estate of said John Grigsby, your petitioner prays that they be summoned to attend the July term, 1847, of your honorable court as herein prayed for, etc.

BALIS EDENS,
Adm'r of John Grigsby.

Filed 2d June, 1847.

J. H. GILLESPIE, *C. P. C.*

Recorded in General Record Book, pages 165 and 166.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed in my office Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C., H. Co.

THE STATE OF TEXAS, }
Houston County, }

To the sheriff of Anderson county, Greeting:

Whereas, Balis Edens, administrator of the estate of John Grigsby, dec'd, at the May term of the probate court, 1847, did file his petition praying that citation may issue requiring the heirs of said John Grigsby, dec'd, to appear at the July term of said court, 1847:

These are therefore to command you to summon Balis Edens as representative of his wife and as guardian of Daniel B. and Emeline Grigsby, heirs of John Grigsby, dec'd, to be and appear at the next term of the probate court to be holden at the court-house in the town of Crockett in and for said county of Houston on the last Monday in July, 1847, then and there to hear and resist (if necessary) said petition of Balis Edens, adm'r of the estate of John Grigsby, dec'd, a copy of which is hereby furnished.

Herein fail not and make due return of this citation with the manner of its execution.

Given under my hand and seal of office at Crockett 17th June, 1847.

J. H. GILLESPIE,
[L. S.] *Cl'k Co. C't, H. Co.*

Executed by serving Balos Edens personally within citation and copy of petition this 17th July, A. D. 1847.

S. G. WELLS,
Sh'ff Anderson County.

Sh'ff Wells' fee $1.00.

Rec'd in office this 22nd June, 1847.

S. G. WELLS,
Sh'ff Anderson County.

Issued 17 June, 1847.

J. H. GILLISPIE,
C. P. C., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C't, A. C.

Grigsby having performed said service of locating and surveying agreeable to contract and the said John Grigsby never having executed a title for the one thousand acres of land during his lifetime to said Crawford Grigsby (who now is also dead),

43 Therefore, it is ordered by the court that Balis Edens, administrator of the estate of John Grigsby, dec'd, be and he is hereby authorized and required to make a deed to the heirs of Crawford Grigsby, dec'd, for one thousand acres of land, agreeably to the contract as proven.

(A true copy.)

Witness my hand and seal of office at Crockett 19 April, 1847.

[L. S.] J. H. GILLESPIE,
Cl'k Co. C't, H. Co.

This is to certify that I have rec'd a title of Balis Edens, adm'r of John Grigsby, executed by him in compliance with the within order.

CRAWFORD GRIGSBY,
Ex'r of —.

Filed 28th Sept., 1847.

J. H. GILLESPIE, *C. P. C.*

Recorded in General Record Book, page 180.

J. H. GILLESPIE,
C. P. C., H. Co.

STATE OF TEXAS, }
Houston County. }

Probate Court, May Term, 1847.

To the Honorable Charles C. Hall, judge of the probate court for said county:

Balis Edens, administrator of the estate of John Grigsby, dec'd, begs leave to represent to your hon. court that he will present his account of his said administration of said estate at the July term, 1847, of your hon. court for final settlement and partition.

Therefore your petitioner prays that citation be issued for the following-named persons, requiring them to attend said settlement at said July term, 1847, and show why said partition of said estate shall not be made if there be any, to wit:

Heirs of John Grigsby, William Grigsby, heir and guard-
44 ian of James Grigsby and Robert H. Grigsby. Elizabeth Mead, heir wife of M. P. Mead. Ruth Ann Edens, heir wife of Balis Edens, John Grigsby, heir Balis Edens, guardian of Dan. B. and Emeline Grigsby.

The above-named persons being all the heirs — representatives of heirs of the estate of said John Grigsby, your petitioner prays that they be summoned to attend the July term, 1847, of your honorable court as herein prayed for, etc.

BALIS EDENS,
Adm'r of John Grigsby.

Filed 2d June, 1847.

J. H. GILLESPIE, *C. P. C.*

Recorded in General Record Book, pages 165 and 166.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed in my office Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C., H. Co.

THE STATE OF TEXAS, }
Houston County, }

To the sheriff of Anderson county, Greeting:

Whereas, Balis Edens, administrator of the estate of John Grigsby, dec'd, at the May term of the probate court, 1847, did file his petition praying that citation may issue requiring the heirs of said John Grigsby, dec'd, to appear at the July term of said court, 1847:

These are therefore to command you to summon Balis Edens as representative of his wife and as guardian of Daniel B. and Emeline Grigsby, heirs of John Grigsby, dec'd, to be and appear at the next term of the probate court to be holden at the court-house in the town of Crockett in and for said county of Houston on the last Monday in July, 1847, then and there to hear and resist (if necessary) said petition of Balis Edens, adm'r of the estate of John Grigsby, dec'd, a copy of which is hereby furnished.

Herein fail not and make due return of this citation with the manner of its execution.

Given under my hand and seal of office at Crockett 17th June, 1847.

J. H. GILLESPIE,
[L. S.] *Clk Co. C't, H. Co.*

Executed by serving Balos Edens personally within citation and copy of petition this 17th July, A. D. 1847.

S. G. WELLS,
Sh'ff Anderson County.

Sh'ff Wells' fee $1.00.

Rec'd in office this 22nd June, 1847.

S. G. WELLS,
Sh'ff Anderson County.

Issued 17 June, 1847.

J. H. GILLISPIE,
C. P. C., H. Co.

Filed Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C't, A. C.

Balance-sheet and exhibit of Balis Edens, administrator of the estate of John Grigsby, dec'd, for a final settlement of his administration of said estate with the probate court of Houston county.

Balis Edens to estate of John Grigsby, dec'd, Dr.

Nature of the indebtedness of administrator with estate:

No.		Am't.
1.	Bond of John McCoy for 200 acres of land in Houston county	$600 00
2.	Bond of Wm. Brittain for 255½ acres of land in Shelby county	765 00
3.	One league and labor of land in Nacogdoches county subject outstanding claims	2,144 00
4.	640 acres land in Nacogdoches county	440 00
5.	Commissioners' bond for two lots in Crockett	20 00
6.	House and lot in the town of Fort Houston	00 000
	Total of administrator's indebtedness	$6,333 65

Estate of John Grigsby, dec'd, to Balis Edens, adm'r, Dr.

Character of indebtedness:

No.		Am't.
5.	200 acres of land held *held* by bond on McCoy	$600 00
6.	255½ acres of land held by bond on Wm. Brittain	765 00
7.	733½ acres of the league and labor survey conveyed by order of court to John Parker	338 325
8.	200 acres of same tract conveyed by order of court to estate of Madden	92 25
9.	1,000 acres of same tract decreed by court to satisfy claim of heirs of C. Grigsby	461 25
10.	Balance of league and labor remaining in the hands of adm'r	1,232 18
11.	640-acre tract of land in Nacog. county still on hand	440 00
12.	Lots in the town of Crockett still on hand	20 00
13.	Lot in Ft. Houston still in the hands of adm'r	00 000

47 Real property in possession of administrator.

Description of the property:

No.		Am't.
1.	267½ acres of the league and labor tract of land	$1,232 18
2.	The 640-acre tract of land	440 00
3.	The land held by bond on McCoy, 200 acres	600 00
4.	The land held by bond on Brittain, 255½ acres	765 00
5.	Lots in the town of Crockett	20 00
6.	Lot in Ft. Houston	00 00
	Total value 3,767 acres of land and the town lots	$3,057 18

Real estate disposed in course of administration.

No. Description of the land:	Am't.
1. 733½ acres of land conveyed to John Parker, assignee, &c.	$338 325
2. 200 acres appropriated to satisfy claim of the estate of Madden	92 25
3. 1,000 acres conveyed to satisfy claim of Crawford Grigsby's heirs	461 25
1,933½ acres total of land disposed of in administering estate	$891 825

48 *Recapitulation.*

Amount of money received by administrator	$693 045
Total appraised value of real estate — personal property now on hand	4,728 175
Total value of land disposed of in course of the administration	891 825
Total value of the effects of the estate	$6,333 045

STATE OF TEXAS, }
Houston County, } *ss:*

Probate Court, Sept. Term, 1847.

To the Hon. Charles C. Hall, judge of the probate court of said county:

Your petitioner, Balis Edens, administrator of the estate of John Grigsby, deceased, would respectfully present to your honor this petition and the accompanying exhibit as a true and correct statement of his accounts with said estate, unless it be an error of a few cents in the addition or the item of $80.00 the amount estimated to pay the costs of court, but he consents that the balance against him shall be taken as that shown by the first statement in the exhibit, which gives the largest indebtedness against him, to wit, the sum of one hundred and seventy-seven dollars and eighty-two and a half cents, but as petitioner will be at extraordinary trouble and expense in attending to the division of the estate between the parties entitled to it as a greater portion of it as will be seen from the appraisement, lays in distant and different counties, he prays your honor to allow him of fifty ($50.00) dollars to be deducted from the balance now against him and as to the other expenses at-
49 tendant upon the division of the estate between distributees to wit: the fees of a surveyor, appraisers and commissioners will nearly if not *the* entire consume the balance against him, he prays your honor that he be authorized to retain it to defray said charges against the estate subject after the final settlement of

all expenses to the claim of each distributee for the proportional part of such sum as may be then in the hands of petitioner of any.

Your petitioner further represents unto your honor that there are certain portions of said estate, to wit, the 255½-acre tract of land situated in Shelby county and also the 200-acre tract in Anderson county, the two lots in the town of Crockett and one lot in Ft. Houston as well as the following personal property: ——.

Your petitioner would further state by way of correction that the lands mentioned in the inventories and exhibits as situated in Nacogdoches county were in that part of said county which forms the county of Dallas.

JASPER & MOORE,
Att'ys for Petitioner.

Personally appeared in open court Balis Edens who being duly sworn says that matters and things contained in the foregoing petition and exhibit, unless it be a slight error in the addition in exhibit, are true to the best of his knowledge and belief.

BALIS EDENS,
Adm'r of John Grigsby.

Subscribed and sworn to this 28th day of Sept., 1847, before me.

J. H. GILLESPIE,
Clk Probate Ct, H. Co.

Let the prayer of the within petition be granted.
September 28th, 1847.

C. C. HALL,
Probate Judge H. Co.

50 Filed 28 Sept., 1847.

J. H. GILLESPIE,
C. P. C., H. Co.

Recorded in General Record Book, pages 166, 167, 168, 169, 170, 171, 172 and 173.

J. H. GILLESPIE,
C. P. C., H. Co.

Filed in my office Jan'y 31, 1848.

JOHN GRIGSBY,
C. P. C., A. Co.

STATE OF TEXAS,)
Anderson County.)

In Probate Court, March Term, 1848.

To the Honorable A. J. Fowler, judge of probate in and for said county:

The petition of Balis Edens and Ruth Ann Edens his wife, formerly Ruth Ann Grigsby, John Grigsby, Elizabeth Mead, formerly Elizabeth Grigsby, and her husband Marcus P. Mead guardian for James and R. H. Grigsby and of Balis Edens guardian for Emeline and Daniel B. Grigsby and of Elizabeth Grigsby guardian for John

and Mary Grigsby (the last two are the children of William Grigsby, dec'd) children, heirs-at-law and legal representatives of John Grigsby, deceased, respectfully showing that there is two hundred and fifty-five and a half acres of land in Shelby county held by bond on William Brittain, two hundred acres in Anderson county held by bond on John McCoy, two lots in the town of Crockett, Houston county, one lot in Fort Houston, one eight per cent. bond on the Republic of Texas for $500, certificate for services rendered in Shelby county as assessor of taxes, receipt on government of Texas for provisions amounting $100, fifty bushels of corn in Anderson county, one note on Thos. J. McKee for $38.40, due bills on William McDonald for $10, one note on I. and R. R. Wiggins
51 of Shelby county for $35.66 belonging to said estate which is not susceptible of equal division among the heirs of said estate: They therefore pray the court to make an order and decree a sale of the same according to law that the proceeds thereof may be equally divided among petitioners.

They also pray your honor to appoint commissioners to appraise and divide that portion of the estate of said deceased among your petitioners consisting of the remainder of the headright league and labor of land in Dallas county of said deceased not disposed of and six hundred and forty acres situated in Dallas county and to make their report at the next July term of the court, leaving the remaining part of the estate undisposed of until the further action of the court. And as in duty bound, etc.

BALIS EDENS.
RUTH ANN EDENS.
JOHN GRIGSBY.
MARCUS P. MEAD.
ELIZABETH MEAD.
MARCUS P. MEAD,
Guardian for Jas. and R. H. Grigsby.
BALIS EDENS,
Guardian for Emaline and Dan'l B. Grigsby.
ELIZABETH GRIGSBY,
Guardian for John and Mary Grigsby.

Filed March 28th, 1848.

JOHN GRIGSBY,
Clk P. Ct, A. C.

I hereby certify the within petition is duly recorded in Book No. 1, probate record of Anderson county, pages 220–'1.

Witness my hand and seal of office June 22d, 1848.

[L. S.]

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY.

52 THE STATE OF TEXAS, }
Anderson County. }

Probate Court, March Term.

To the Hon. A. J. Fowler, judge of the probate court of said county:

Your petitioner, Balis Edens, administrator of the estate of John Grigsby, dec'd, respectfully shows to your hon. court that the portion of his petition (filed Nov. term of the probate court of Houston county) as regards the appraisement and disposition of certain small portions of property therein mentioned is superceded by a joint petition of all the heirs of said John Grigsby, dec'd, for a sale of the said property; your petitioner therefore prays that so much of said petition as regards said small portions — property be withdrawn from the consideration of your hon. court; and that the balance of said petition be acted upon. Your petitioner as in duty bound will ever pray.

BALIS EDENS,
Administrator of John Grigsby, Dec'd.

Filed March 28, 1848.

JOHN GRIGSBY,
Clk P. Ct, A. C.

I hereby certify that the within petition is duly recorded in Book No. 1, probate record of Anderson county, pages 221–'2.

W. G. W. JOWERS,
C. P. C, A. C.,
By F. FAUNT LE ROY.

BALIS EDENS }
vs.
JOHN GRIGSBY'S H's. }

The parties agree to admit the following facts as proved:

First. That Jno. Grigsby married Louisa Thompson in the
53 year 1833, in the State of Illinois, and that they emigrated to Texas during the fall of 1834, and that John Grigsby died in Texas March, 1841.

Second. That letters of administration on the estate of said Grigsby were granted by the probate court of Houston county to said Louisa Grigsby and Crawford Grigsby, both of whom are dead.

Third. That said Louisa married Balis Edens about the first of March, 1842, and died in June, 1843, leaving a child by Edens, to wit: Maria Louisa Edens and two by John Grigsby, to wit: Emaline and Daniel B. Grigsby.

Fourth. That said Edens is guardian for said Louisa, Emaline and Daniel, and adm'r *de bonis non* of said John Grigsby.

Fifth. That Ruth Ann Edens, formerly Grigsby, William Grigsby, Elizabeth Mead formerly Grigsby, John Grigsby, James Grigsby, Robert H. Grigsby, and Crawford Grigsby, were the children of said John Grigsby, dec'd, by a former marriage, and that said Crawford

and William Grigsby are both dead and that said William left two children, to wit: John and Mary Grigsby; Crawford died without children and that he made a will.

And lastly, that the parties or their guardians may appear and plead in the several relations by which they are described.

It is further agreed and understood by the parties that if the above facts are true and the above statement should embrace all the material facts that the same shall be received by the court as evidence and that if they are not true or do not embrace the facts as known by the plaintiff, then they are not to be received in the particular variance or omission.

54 It is further agreed that the grant of a league of land and one labor was granted the said John Grigsby about the year '37 or '38 and located and surveyed in fall of forty.

March 24, 1848.

JASPER,
Att'y for Plaintiff.
REEVES,
Att'y for Def'ts.

It is further agreed that the property in controversy was acquired in Texas, prior to March, 1841, and subsequent to the fall of 1834, consisting of about 3,600 acres of land and personal estate amounting to $1,300 per sale bill.

JASPER, — *Plaintiff.*
REEVES, *For Def'ts.*

It is further admitted by agreement that the said Louisa Grigsby had no property set apart by order of court for her support and that she supported herself and her two children entirely by her own means from the 10 of Oct., 1841, until the 13th of June, 1843, with the exception of about fifty bushels of corn, being a part of the crop raised on the village farm in 1841, and being the portion of said crop that was supposed to be coming to her and her two children (the balance of the heirs received at the same time by agreement among themselves the portions of said crop of corn to which they thought they were entitled) and the use of one-half of said farm, about fifteen acres of land in a state of cultivation and the use of the cabins and other out-buildings from the 10th of Oct., 1841, until the 13th of June, 1843, at which time she died and left a crop growing which was inventoried as the property of her estate.

55 It is also admitted that said Louisa Grigsby bought at the sale of the personal property of said estate property to the amount of about $470.00 for which she stands charged and her indebtedness admitted by her administrator.

BALIS EDENS,
Administrator of the Estate of John Grigsby, Dec'd, and Guardian of the Minor Heirs of Louisa Edens and Husband of Ruth An- Edens.

Filed March 28th, 1848.

JNO. GRIGSBY, *C. P. C.*

I certify that the within agreement is duly recorded in Book No. 1, probate record of Anderson county, pages 222, '3, '4, '5.

Witness my hand and seal of office June 22, 1848.

[L. S.] W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

STATE OF TEXAS, }
Anderson County. }

Probate Court, M'ch Term, 1848. A. J. Fowler, Probate Judge.

Present: John Grigsby, cl'k P. A. C.

Ordered by the court that Epps be appointed to act as sheriff for this court.

BALIS EDENS, Adm'r Jno. Grigsby, Dec'd, and Guardian of Maria Louisa Edens, and also Guardian for Emeline Grigsby and Dan'l B. Grigsby and Husband of Ruth Ann Edens, Formerly Grigsby,

vs.

Against THE REMAINDER OF THE HEIRS OF JNO. GRIGSBY, D'c.

Petition for Partition of the Est. of Jno. Grigsby, D'c.

This day came the parties aforesaid and the agreements of counsel being heard on the partition and the statement of facts agreed to and signed by the parties and the court being now fully
56 advised of and concerning the premises, it is ordered, adjudged and decreed by the court that the est. of Jno. Grigsby, dec'd, be equally divided between the heirs of Jno. Grigsby, dec'd, and their legal representatives of such as may have died, to wit: Crawford Grigsby, who has departed this life, Wm. Grigsby, also dec'd, Elizabeth Mead formerly Grigsby, Jno. Grigsby, Ruth Ann Edens, formerly Grigsby, James Grigsby, Rob't H. Grigsby, Emeline Grigsby and Dan'l B. Grigsby.

Ordered by the court that Sam'l G. Newton, —— Knight, Amos McCormus, Stephen McCormus, A. J. Smith, —— Newton, or any three of them be and they are hereby appointed commissioners to divide the following real estate belonging to the succession of Jno. Grigsby, dec'd, to wit: All the real estate of said deceased situated in Dallas county to be pointed out by the adm'r or heirs of said dec'd, said land to be divided into nine equal parts according to quality and quantity and share and share alike without designating the particular shares to which any one of the heirs may be entitled and that they return at the next July term of this court a full report of their acts accompanied with a plot plainly setting forth each division or share and that said commissioners are hereby empowered to call to their assistance any legal surveyor to survey aforesaid lands.

Probate Court of Anderson County, July Term, 1848.

THE STATE OF TEXAS:

To the Hon. John B. Mallard, judge of the probate court of said county:

Anon M'Connas, I. A. Smith and O. W. Knight, commis-
57 sioners of partition appointed by your honorable court at its May-March term of 1848, to divide all the real estate belonging to the estate of Jno. Grigsby, deceased, situated and being in the county of Dallas, to be pointed out by the administrator or heirs of said estate, beg leave to show unto your honor that after being duly sworn they did proceed and carefully examine all of said estate, as pointed out to them by said administrator, viz: A part of the headright le-g. and labor of said John Grigsby, and a six hundred and forty acre tract surveyed adjoining said le-g. and labor in the name of Jno. A. Sylvester and patented in the name of said Grigsby, and have divided the same into nine equal shares according to the quantity and quality, as required by your honorable court, as follows, viz: Lot No. 1, being the northwest half of said 640-acre tract containing 320 acres; lot No. 2, being the remaining half of said tract and adjoining the said John Grigsby headright grant containing 320 acres; lot No. 3, being the southwest part of said grant now belonging to said estate and adjoining said 640-acre tract containing 510 acres; lot No. 4, containing 402 acres adjoining lot No. 3; lot No. 5, containing 413 acres adjoining lot No. 4; lot No. 6, adjoining lot No. 5, containing 438 acres; lot No. 7, adjoining lot No. 6, containing 500 acres; lot No. 8, adjoining lot No. 7, containing 530 acres; lot No. 9, adjoining lot No. 8, containing 491 acres, and being the northeastern part of said le-g. and labor; all of which is truly represented by the accompanying plot of survey made by A. G. Walker, deputy surveyor of Dallas county.

J. A. SMITH,
AMON McCOMMAS,
O. W. KNIGHT,
Commissioners.

58 STATE OF TEXAS,)
County of Dallas.)

Personally appeared before the undersigned, a notary public in and for the county and State aforesaid, Amon McCommas, James A. Smith and O. W. Knight, and deposeth and saith that the above report as a partition of land between the heirs of John Grigsby is just and according to the best of their judgment.

Given under my hand and seal of office this the 1st day of June, 1848.

J. N. BRYAN,
[L. S.] *Notary Public, Dallas Co., Texas.*

Approved July 31st, 1848.

J. B. MALLARD,
Judge Pro.

5—30

Filed July 31st, 1848.

W. G. W. JOWERS,
C. P. C., A. C.
By F. FAUNT LE ROY.

I hereby certify the within report, &c., are duly recorded in Book No. 1, probate record Anderson county, pages 272, '3, '4.

Witness my hand and seal of office Aug. 3, 1848.

[L. S.] W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

THE STATE OF TEXAS, } *To wit:*
County of Dallas, }

The following *is* the boundaries of lots Nos. 1 and 2 (as divided by me in obedience to the order of the commissioners appointed for the purpose) of the survey No. 25 made in the name of Jas. A. Sylvester for 640 acres, to wit:

Lot No. 1, 320 acres: Beginning at the north corner of said survey a stake in a prairie from which a blackjack 11 in. bs. N. 14° 59 30′ W. 125 vs.; thence running with the original boundary and varying 2° 45′ from the original call S. 47° 45′ E. 950.4 vs. to a stake in said boundary and in said prairie. From said stake a locust 6 in. bc. N. 59° W. 120½ vs.; thence S. 45° W. 1,900.8 vs. to a stake in the S. W. boundary. Locust 16 in. bs. N. 43° E. 7½ and a hackberry 11 in. bs. N. 58° W. 8 vs.; thence N. 47° 45′ W. 950.4 vs. to the west corner of said survey No. 25, elm 20 in. bs. N. 40° W. 13½ vs. and an elm 19 in. bs. S. 71° E. 4½ vs.; thence N. 45° E. 1,900.8 vs. to the beginning; variation 9° 10′ E.

May 27th, 1848.

A. G. WALKER, *S. D. C.*
JOHN ULTY, }
A. M. MALIN, } *C. C.*

Lot No. 2, 320 as.: Beginning at the east corner of lot No. 1 a stake in a prairie locust 6 in. bs. N. 59° W. 120½ vs.; thence running with the S. E. boundary of said lot S. 45° W. 1,900.8 vs. to its south corner a stake from which a locust 16 in. bs. N. 43° E. 7½ vs. and a hackberry 11 in. bs. N. 58° W. 8 vs.; thence with the S. W. boundary of said survey No. 25 S. 47° 45′ E. crossing a bend of Trinity river 950.4 vs. to a stake in the N. W. boundary of survey No. 23, hackberry 2 ft. bs. S. 84° W. 6 vs. and a hackberry 2 ft. bs. N. 80° W. 7 vs.; thence with said boundary N. 46° 30′ E. 1,900.8 vs. crossing Turtle creek several times to the east corner of said survey a stake from which a blackjack 2 ft. bs. N. 78° E. 11.4 vs. and a post oak 20 in. bs. N. 28° W. 11⅓ vs.; thence with the original boundary N. 47° 45′ W. 950 vs. to the beginning. Variation 9° 10′ E.

May 27th, 1848.

A. J. WALKER, *S. D. C.*
JOHN ULTY, }
A. M. MATIN, } *C. C.*

Filed July 31st, 1848.

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

60 I certify the above and within fi*le*d-notes are duly recorded in Book No. 1, probate record of Anderson county, pages 274–'5.

Witness my hand and seal of office August 4th, 1848.

[L. S.] W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

THE STATE OF TEXAS, } *To wit:*
County of Dallas, }

The following *is* the boundaries of lots 3 and 4 (as surveyed by me in obedience to the order of the commissioners appointed for the purpose) of a part of a survey made in the name of John Grigsby No. 23 for 26 labors of land, to wit:

Lot No. 3, 510 as.: Beginning at the west corner of said survey a stake on the N. E. bank of Trinity, cotton-wood 35 in. bs. S. 62° E. 16 vs. Thence running north with the original boundary and varying 1° 30′ from its call, N. 46° 30′ E. at 1,080 vs., Turtle Creek Co. S. 50° W. and again at 1,500 vs. in all 1,600 vs. to a stake, post oak 17 in. bs. N. 2° W. 8 vs.; thence S. 45° E. at 40 vs. sd. creek, in all 1,760 vs. to a stake in the N. W. boundary of the 1,000-acre tract; post oak 14 in. bs. N. 25° W. 4 vs. and a post oak 12 in. bs. S. 17° E. 23 vs.; thence with said boundary S. 45° W. 1,660 vs. to a stake in the original boundary of said survey; post oak 8 in. bs. N. 64° E. 4 vs. and a forked post oak 2 ft. bs. N. 37° E. 11 vs.; thence with said boundary N. 42° E. C. Varying 3° from the old call and crossing a bend of said river 1,772 vs. to the beginning. Variations 9° 10′ E.

May 27th, 1848.

A. G. WALKER, *S. D. C.*
JOHN UTLY, } *C. C.*
A. M. MALIN, }

61 Lot No. 4, 402 as.: Beginning at the east corner of lot No. 3, a stake, a post oak 14 in. bs. N. 25° W. 4 vs and post oak 12 in. bs. S. 17° E. 23 vs.; thence with the N. W. boundary of the 1,000-acre tract N. 45° 625 vs. to its north corner a stake post oak 22 in. bs. S. 55° E. 6 vs. and a post oak 18 in. bs. N. 86° E. 8 vs.; thence with the N. E. boundary of sd. tract and in the N. W. boundary of the 733⅓-acre tract; thence with its N. W. boundary N. 45° E. 236 vs. pass*ed* its north corner in all 288 vs. to a stake in a prairie, post oak 12 in. bs. N. 19° 30′ E. 231 vs.; thence N. 45° W. 4,105 vs. to a stake in the N. W. boundary of the original survey, post oak 20 in. bs. S. 25° E. 6 vs. and a post oak 16 in. bs. N. 14° W. 7 vs.; thence with said boundary S. 46° 30′ W. 913 vs. crossing Turtle creek to

the north corner of lot No. 3 stake, post oak 20 in. bs. S. 71° W. 5 vs. and post oak 17 in. bs. N. 2° W. 8 vs.; thence S. 45 E. at 40 vs. sd. creek, in all 1,760 vs. to the beginning. Variations 9° 10′ E.

May 29th, 1848.

A. G. WALKER, *S. D. C.*
JOHN SNYDER, }
JOHN UTLY, } *C. C.*

Filed 31st July, 1848.

W. G. W. JOWERS,
C. P. C., A. C.

I hereby certify the above-attached field-notes are duly recorded in Book No. 1, probate records Anderson county, pages 276–'7.

Witness my hand and seal of office, August 4th, 1848.

[L. S.] W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

THE STATE OF TEXAS, }
County of Dallas. }

Lot No. 5, 413 as. (a part of John Grigsby's survey No. 23 of 26 labors of land):

62 Beginning at the north corner of lot No. 4, a stake in the northwest boundary of said survey a post oak 20 in. bs. S. 25° E. 6 vs. and a post oak 16 in. bs. N. 14 W. 7 vs.; thence running with said boundary N. 46½ E. varying 1° 30′ from the original call 405 vs. to a stake in said boundary and in a small prairie post oak 22 in. bs. N. 50° W. 58 vs. and a post oak 22 in. bs. N. 81° E. 37 vs.; thence S. 45° E. 5,555 vs. to a stake in the S. E. boundary of said survey, in a mound and prairie elm 5 in. bs. N. 64° E. 119½ vs. and a hackberry 12 in. bs. S. 52° W. 157 vs.; thence with said — S. 31° W. varying 4° from the original call 457 vs. to a stake in a mound and in said prairie an elm 6 in. bs. N. 45° 30′ W. 161 vs.; thence with the N. E. boundary of the 733½-acre tract N. 45° W. 1,491 vs. to its north corner a stake in a mound and in the line of lot No. 5; thence with said line N. 45° E. 52 vs. to its E. corner a stake in a mound in said prairie, a lone post oak 12 in. bs. N. 19° 30′ E. 251 vs.; thence with the N. E. boundary of said lot N. 45° W. at 1,180 vs. branch co. S. In all 4,100 vs. to the beginning. Variation 9° 10′ E.

May 30, 1848.

A. G. WALKER, *S. D. C.*
JOHN ULTY, }
A. M. MALIN, } *C. C.*

Lot No. 6, 438 acres: Beginning at the N. corner of lot No. 5 a stake in a small prairie and in the N. W. boundary of the original survey post oak 22 in. bs. N. 50° W. 58 vs. and a post oak 22 in. bs. N. 81° E. 37 vs.; thence running with said boundary N. 46° E.

varying 1° 30′ from the original call 447½ vs. to a stake in a drain in said boundary post oak 10 in. bs. S. 83° E. 6 vs. and a post oak 9 in. bs. S. 56° 30′ E. 6 vs.; thence S. 45° E. 5,500 vs. to a stake in a mound in a prairie and in the S. E. boundary of said survey No. 23, a
63 lone elm 6 in. bs. S. 50° 30′ W. 150½ vs. and an elm 3 in. elm 4 in. and an elm 5 in. bs. S. 86° W. 106 vs.; thence with said boundary S. 41° W. varying 4° from the original call 447½ vs. to the E. corner of said lot No. 5 a stake in a mound in said prairie and in said boundary, elm 5 in. bs. N. 64° E. 119½ vs. and a hackberry 12 in. bs. S. 72° W. 157 vs. Thence with the N. E. boundary of said lot No. 5 N. 45° W. at 1,640 vs. timber, in all 5,555 vs. to the beginning. Variation 9° 10′ E.

May 30th 1848.

A. G. WALKER, *S. D. C.*
JOHN UTLY, } *C. C.*
A. M. MALIN, }

Lot No. 7, 500 acres: Beginning at the N. corner of lot No. 6 a stake in a drain and in N. W. boundary of the original survey No. 25 post oak 2 in. bs. S. 83° E. 6 vs. post oak 2 in. bs. S. 56° 30′ E. 8 vs.; thence with said boundary N. 45° 30′ E. varying 1° 30′ from the original call 515⅔ vs. to a stake in a mound and in said boundary post oak 21 in. bs. S. 23° 30′ E. 19 vs. and a b-ackjack 6 in. bs. N. 52° E. 4½ vs.; thence S. 45° E. 5,449 vs. to a stake in a mound in the S. E. boundary of said survey No. 23 and in a prairie forked or double hackberry 15 in. bs. N. 62° 45′ E. 300 vs.; thence with said boundary S. 41° W. varying 4° from the original call 515⅔ vs. to the E. corner of said lot No. 6 a stake in a mound in said prairie and in said boundary a lone elm 6 in. bs. S. 50° 30′ W. 165½ vs. and an elm 3 in. elm 4 in. and an elm 5 in. bs. S. 86° W. 106 vs.; thence with the N. E. boundary of said lot No. 6 N. 45° W. 5,500 vs. to the beginning. Variation 9° 10′ E.

May 30th 1848.

A. G. WALKER, *S. D. C.*
JOHN UTLY, } *C. C.*
A. M. MALIN, }

64 Filed July 31st, 1848.

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

I hereby certify the within field-notes are duly recorded in Cook No. 1, probate record Anderson county, pages 277, '8, '9.

Witness my hand and seal of office August 4th, 1848.

[L. S.]

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

STATE OF TEXAS, } *To wit:*
County of Dallas, }

Lot No. 8, 530 acres: Part of a survey No. 23 in the name of John Grigsby for 26 labors of land. Beginning at the north corner of lot No. 7 stake in a mound and in the original boundary of said survey No. 23 post oak 21 in. bs. S. 23° 30′ E. 19 vs., and a blackjack 6 in. bs. N. 52° E. 4½ vs.; thence running with said boundary N. 46° ½ E. varying 1° 30′ from the original call 630½ vs. to a stake in a mound in said boundary and in a prairie locust 6 in., locust 8 in. and a locust 6 in. bs. N. 3° W. 27 vs.; thence S. 45° E. at 2,380 vs. passed about 30 vs. on the N. E. side of 12 post oaks at 3,500 vs. passed 2 vs. on the N. E. side of a forked cotton-wood 2 ft. in all 4,355 vs. to a stake in a mound in said prairie; thence S. 45° W. 416 vs. to a stake in a mound and in said prairie, lone post oak 14 in. bs. N. 13° 30′ W. 182 vs.; thence S. 45° E. 1,068 vs. to a stake in a mound in said prairie and in the S. E. boundary of said survey No. 23 a double or forked hackberry 15 in. bs. S. 75° E. 124 vs.; thence with said boundary S. 41° W. varying 4° from the original call 222 vs. to a stake in a mound in said prairie and in said
65 boundary and the east corner of said lot No. 7, the double or forked hackberry 15 in. bs. N. 62° 45′ E. 300 vs.; thence with the N. E. boundary of said lot No. 7 N. 45° W. 5.449 vs. to the beginning. Variation 9° 10′ E.

May 30th, 1848.

A. G. WALLER, *S. D. C.*
JOHN UTLY, } *C. C.*
A. M. MALIN, }

Lot No. 9, 491 as., part of the above-named survey:

Beginning at the north corner of lot No. 8 a stake in a mound in a prairie and in the N. W. boundary of said survey No. 23, a locust 6 in., a locust 8 in. and a locust 6 in. bs. N. 3° W. 27 vs.; thence running with said boundary N. 45° E. 633½ vs. to a stake in said prairie the original north corner, the elm 18 in. bs. S. 79° 30′ W. 74 vs. and the cotton-wood 20 in. bs. S. 35° W. 46½ vs. both original bearing trees; thence with the original N. E. boundary of said survey No. 23 S. 45° E. 4,355 vs. to a stake in said boundary and in said prairie; thence S. 45° W. 633½ vs. to a stake in a mound in said prairie and the N. E. corner of said lot No. 8 N. 45° W. at 1,975 vs. passed about 30 vs. on the N. E. side of 12 post oaks in all 4,355 vs. to the beginning. Variation 9° 10′ E.

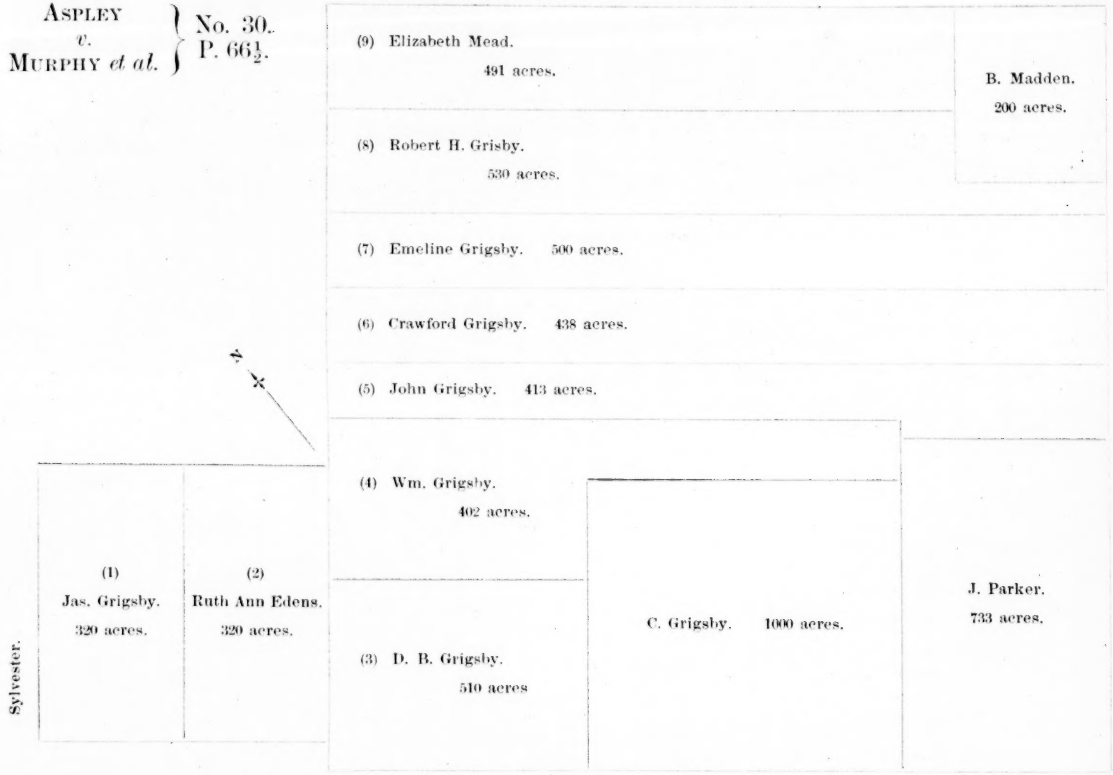
May 30th 1848.

A. G. WALKER, *S. D. C.*
JOHN UTLY.
A. M. MALIN.

I, A. A. G. Walker, surveyor for the county of Dallas and State of Texas, do hereby solemnly swear under my official oath that the surveys No. 1, 320 as.; No. 2, 320 as.; No. 3, 510 as.; No. 4, 402 as.;

ASPLEY
v.
MURPHY *et al.*

No. 30.
P. 66½.



No. 5, 413 as.; No. 6, 438 as.; No. 7, 500 as.; No. 8, 530 as., and No. 9, 491 as., was made by me as directed by the commissioners Amon McComas and others, and that the field-notes, etc., of said surveys or lots truly describe the same, said field-notes bearing date May
66 25th to May 30th, 1848, and are hereby presented, as witness my hand this the 1st day of June, 1848.

A. G. WALKER, *S. D. C.*

Filed July 31st, 1848.

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

I hereby certify the within field-notes are duly recorded in Book 1, probate record, Anderson county, pages 280, '1, '2.

Witness my hand and seal of office Aug. 4th, 1848.

[L. S.]

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

This is a connected plot showing how the survey No. 25 in the name of Jas. A. Sylvester of 640 as. and the balance of the survey No. 23 in the name of John Grigsby for 26 labors of land have been divided by the commissioners appointed for that purpose and surveyed by the undersigned agreeably to their order as given under my hand this the 1st day of June, A. D. 1848.

A. G. WALKER, *S. D. C.*

Filed July 31st, 1848.

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY.

I hereby certify that the within plot is duly recorded in Book No. 1, probate record, Anderson county, page 282.

Witness my hand and seal of office this the 4th of August, 1848.

[L. S.]

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY, *D. C.*

(Here follows diagram marked p. 66½.)

67 STATE OF TEXAS,)
County of Dallas.)

I, A. G. Walker, surveyor for Dallas county, district of Nacogdoches, do certify that the foregoing connected plot represents how or in what way the survey No. 25 in the name James A. Sylvester of 640 acres, and the balance of survey No. 23 in the name of John Grigsby of 26 labors of land have been divided by the commissioners Amon McComas and others, who were appointed for that purpose,

and which land was surveyed by me according to their direction as witness my hand this the 14th day of July, A. D. 1848.

A. G. WALKER, *S. D. C.*

Filed July 31st, 1848.

W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY.

I do hereby certify the aforegoing plot was duly recorded in Book No. 1, probate record, Anderson county, pages 283 and 284.

Witness my hand and seal of office Aug. 4, 1848.

[L. S.] W. G. W. JOWERS,
C. P. C., A. C.,
By F. FAUNT LE ROY. *D. C.*

Filed 1st October, 1849.

J. W. SMITH,
Clk Co. Co., A. C.

I certify the within plot and certificate is duly recorded in my office in Book B, page 188, and was so recorded this 3rd day of October, A. D. 1849.

In testimony whereof, I have hereunto set my hand and seal of office at Dallas, this the day last above written.

[L. S.] JNO. W. SMITH,
Clk Co. Co., D. Co., T.

68 July Term, 1848.

THE STATE OF TEXAS, }
County of Anderson. }

Probate Court, July Term, 1848.

Present: J. B. Mallard, prob. judge; W. G. W. Jowers, cl'k, by F. Faunt Le Roy, D. C.

Ordered by the court that William Mitchell be and he is hereby appointed to act as sheriff for this term of court.

Ordered by the court that the report of the commissioners appointed to divide the real estate of John Grigsby, deceased, this day brought into court be and the same is hereby approved, and ordered to record.

Ordered by the court that the sheriff and clerk proceed to open court to allott to the heirs of John Grigsby, deceased, the land of said Grisby, one lot to each, according to the division made by the commissioners appointed for that purpose.

Whereupon said allottment was made according to order.

Ordered by the court that the administrator of John Grigsby, deceased, make conveyances to the heirs of said John Grigsby of their respective portions of the land of said Grigsby in accordanc white the division plot to-day submitted to the court, and with the allottment made by the sheriff and clerk.

Ordered by the court that the clerk write the name of each heir of John Grigsby, deceased, on his or her lot as described in the plot of the land of said Grigsby to-day filed in court.

69 August Term, 1848.

THE STATE OF TEXAS, }
County of Anderson, }

Probate Court, July Term, 1848.

Present: J. B. Mallard, P. judge; John P. Walton, C. C. C., A. C.; Wm. Rodgers, sheriff.

Ordered by the court that the order made at the July term of the court, A. D. 1848, requiring sheriff and clerk to proceed to open court to allot/ to the heirs of John Grigsby, dec'd, the lands of said Grigsby according to a division previously made by commissioners appointed for that purpose, be and the same is hereby so amended as to read after the words Whereupon said allot/ment was made according to order, to wit: To James Grigsby was allotted the parcel of land described in plot as lot No. 1, containing 320 as.; to Ruth Ann Grigsby or Edens, lot No. 2, containing 320 as.; to D. B. Grigsby, lot No. 3, containing 510 as.; to William Grigsby *was* lot No. 4, containing 402 as.; to John Grigsby lot No. 5, containing 413 as.; to Crawford —— lot No. 6, containing 438 as.; to Emeline Grigsby, lot No. 7, containing 500 as.; to Robert H. Grigsby, lot No. 8, containing 530 as.; to Elizabeth Grigsby, lot No. 9, containing 491 as.

Ordered that the above and foregoing order be placed on record.

THE STATE OF TEXAS, }
County of Anderson. }

I, Z. A. McReynolds, county clerk, in and for Anderson county, Texas, hereby certify that the foregoing 28 pages contains true copies of the following proceedings had in the county court of Anderson county, in the matter of the estate of John Grigsby, dec'd, to
70 wit: 1st. Transcript from Houston county. 2nd. Petition for letters of administration by Louisa Edens. 3rd. Bond. 4th. So much of inventory and appraisement as relates to land. 5th. Petition of Balis Edens for letters of administration *de bonis non.* 6th. Bond of Edens. 7th. So much of exhibit or inventory of Balis Edens as relates to land. 8th. So much of exhibit of Balis Edens as relates to land. 9th. Voucher No. 7, being copy of order, &c. 10th. Voucher No. 8. 11th. Petition setting up rights of Crawford Grigsby to 1,000 acres of land. 12th. Affidavit of William Grigsby. 13th. Voucher No. 9. 14th. Petition to settle estate. 15th. Citation to Edens. 16th. So much of petition for final settlement as relates to land. 17th. Petition of heirs for division of estate. 18th. Petition of Edens. 19th. Statement of facts. 20th. Order of court on petition of partition. 21st. Order of court appointing appraisers. 22nd.

Report of commissioners to partition followed by field-notes of land and two plots of said land. 23rd. Four orders of court passed at July term, 1848, of county court of Anderson county. 24th. Order of court amending order passed at July term, 1848.

Given under my hand and seal of office this the 28th day of September, A. D. 1891.

(Signed) Z. A. McREYNOLDS,
County Court, *Anderson County, Texas.*

To the admission of which probate proceedings in evidence, and especially to the order or decree of the said probate court, made at its March term, 1847, and dated the 29th day of March, 1847, decreeing specific performance of a contract between John Grigsby and Crawford Grigsby, for the location of said John Grigsby's headright certificate for one league and labor of land, and directing the
71 administrator of the estate of said John Grigsby, deceased, to make a conveyance of one thousand acres of said land to the heirs of said Crawford Grigsby, the plaintiff by his counsel objected, because:

1. It appears from the face of said probate proceedings, that said probate court did not have jurisdiction to make said order or decree at the time when it attempted to do so.

2. It does not appear from the face of said probate proceedings that said probate court did have jurisdiction to make said order or decree, at the time when it attempted to do so.

3. It appears that said order or decree is void, because the claim on which it was based was allowed by Balis Edens, the administrator of the estate of said John Grigsby, and who was at the time interested in said claim, his wife, Ruth Ann, being one of the devisees under the will of Crawford Grigsby.

4. It appears that said order or decree, simply adjudged the right of the estate of Crawford Grigsby, deceased, to an undivided interest of one thousand acres, third choice, in the John Grigsby league and labor survey, and directed the administrator of John Grigsby's estate, to make a conveyance in compliance therewith, thus constituting the estate of Crawford Grigsby a tenant in common to the extent of one thousand acres, with the estate of John Grigsby, in said league and labor survey, which is merely an equitable title or interest therein and cannot avail the defendants in this action at law; all of which objections were by the court overruled, and said probate proceedings admitted in evidence and read to the jury, over the objections of the plaintiff, to which ruling of the court the
72 plaintiff, by his counsel, then and there duly excepted.

The defendants read in evidence, without objection, the following:

Last Will and Testament of Crawford Grigsby.

Certified copy.

REPUBLIC OF TEXAS,)
Houston County.)

In the name of God, amen. This my last will and testament, I solemnly make having the fear of God before my eyes and being in my right mind. 1st. I give and bequeath my soul to the God that gave it. 2ndly: When I am dead my body I give to the dust from whence it came. 3rdly: I wish all my just debts to be paid out of my property. 4thly: I wish my brothers James Grigsby and Robert H. Grigsby jointly to have three hundred and twenty acres of land to be taken off of the lower end of my land so as to include the farm and houses where I now live. 5thly: I wish my brothers William and John Grigsby to live on said farm and keep the stock and all together for the support of my brothers James and Robert H., and sisters Elizabeth and Ruthy, and until such time as my executors shall think best to make other engagements, or the above-named brothers and sisters are otherwise provided for, at which time I wish all of my property except the before-named three hundred and twenty acres to be equally divided between the following-named brothers and sisters, that is to say, William, John, James Robert H. and Ruthy Grigsby and Elizabeth Mitchell. 6thly: I
73 nominate and appoint William F. Sadler to execute this my last will and testament. March 7th, 1843.

CRAWFORD GRIGSBY.

Signed in the presence of—
MARCUS P. MEAD.
A. H. MOORE.
JAS. A. CHORMBEY.

REPUBLIC OF TEXAS,)
Houston County.)

August Term Probate Court, A. D. 1843.

Personally came in open court M. P. Mead and A. H. Moore and upon their oath do say that they were present and saw Crawford Grigsby sign the within last will and at the signing thereof the said Crawford Grigsby was of a sound disposing mind and memory and that the instrument upon which this certificate is made is the last will of Crawford Grigsby.

M. P. MEAD.
A. H. MOORE.

Sworn to and subscribed before me in open court, Aug. 28th, 1843.
[L. S] H. NELSON,
Dep. P. C., H. Co.

July 20th, 1843, the clerk will give notice as the law directs.

E. GOSSETT,
Judge of Probate.

I do hereby certify that the within last will of Crawford Grigsby is duly recorded in Book E of the records of Houston county, on pages 97 and 98.

Witness my hand and seal of office.

[L. S.]

C. H. NELSON,
C. C., H. Co.,
By H. NELSON, *Deputy.*

Filed Aug. 28th, 1843.

H. NELSON,
Dep. P. C., H. Co.

74 EXHIBIT A.

THE STATE OF TEXAS, }
County of Houston. }

Probate Court of Houston County, August Term, 1848, August 28th 1843.

At the above-named term of the probate court of Houston county the following order among others was made: "Ordered by the court that the last will of Crawford Grigsby as was this day duly proven in open court be admitted to probate.

THE STATE OF TEXAS, }
County of Houston. }

I, O. C. Aldrich, clerk of the county court of said county, do hereby certify that the above next three lines contain a true and correct copy of the order of the probate court of Houston county admitting the last will of Crawford Grigsby to probate as appears from the records of my office in Book B, page 30, of the probate minutes of said county.

Witness my hand and seal of office at Crockett, Texas, this the 9th day of May, 1879.

[L. S.]

O. C. ALDRICH,
Clerk Co. C't, H. Co.

Filed for record June 12th, 1879, at 8 o'clock a. m.

JOM CONWAY,
Clerk Co. C't, A. Co.

THE STATE OF TEXAS, }
County of Anderson. }

I, Z. A. McReynolds, county clerk in and for the county and State aforesaid, hereby certify that the foregoing is a true copy of
75 the record of Crawford Grigsby's will and probate as is of record in the records of deeds for Anderson county, Texas, in Book 7, on pages 28, 29 and 30.

Given under my hand and seal of office this the 31st day of Dec., A. D. 1889.

[L. S.] Z. A. McREYNOLDS,
County Clerk, Anderson County, Texas.

Filed for record January 13th, 1890, at 10 o'clock a. m.
S. B. SCOTT, *County Clerk,*
By T. B. SALMONS, *Deputy.*

Recorded February 3rd, 1890.
S. B. SCOTT, *County Clerk,*
By J. E. TURNER, *Deputy.*

Recorded in Book 122, page 378, Dallas county deed records.

And be it further remembered that the defendants also offered in evidence the following certified copy of a deed of conveyance from Balis Edens, administrator of the estate of John Grigsby, deceased, to William Grigsby, executor of the estate of Crawford Grigsby, dec'd:

Balis Edens, administrator, to Wm. Grigsby, executor. } Deed.

THE STATE OF TEXAS, }
Anderson County. }

Know all men that I, Balis Edens, as administrator of John Grigsby, late of Houston county and State aforesaid, dec'd, in consideration of $500 to the said John Grigsby paid in his lifetime by Crawford Grigsby, late of Houston county and said State, dec'd, and in compliance with an order of the probate court of Houston county, made at its March term, A. D. 1847, directing me, the said
76 Edens, as such administrator of the said Grigsby, to make a deed for 1,000 acres of land out of the headright league and labor of said John Grigsby, dec'd, situated in what was formerly Nacogdoches but now Dallas county and State of Texas, to William Grigsby, executor of Crawford Grigsby, dec'd, for the use and benefit of the heirs of said Crawford Grigsby, dec'd, do by these presents relinquish and convey unto William Grigsby, as executor of Crawford Grigsby, dec'd, for the entire use and benefit of the heirs of the said Crawford Grigsby, all the right, title and interest of which the said John Grigsby was seized and possessed at the time of his death in and to the following tract or parcel of land lying, being and situate in what was formerly Nacogdoches but now Dallas county and State aforesaid, and known as a part of the headright league and labor of said John Grigsby, dec'd, -butted and bounded as follows: Beginning at a post in the S. W. boundary of John Grigsby's headright grant, 1,427 yds. from the S. corner of said grant and at the W. cor. of John Parker's 733⅓ acres survey from which a p. o. 10 in. dia. brs. N. 38 W. 9½ yds. distant, another p. o. 12 in. dia. brs.

N. 84 E. 7½ yds. distant; thence N. 45 E. 2,262 yds. to stake from which a pecan 12 in. brs. S. 14 W. 7 yds. dist. and a cedar 14 in. dia. brs. N. 61 E. 7½ yds. dist.; thence N. 45 W. 2,200 yds. to a stake from which a p. o. 12 in. dia. brs. N. 86 E. 8½ yds. dist. and p. o. 18 in. dia. brs. S. 85 E. 5½ yds.; thence S. 45 W. 2,139 yds. to a stake in the S. W. boundary line of said grant from which a p. o. 5 in. dia. brs. N. 65 E. 4 yds. dist. and a p. o. 20 in. dia. brs. N. 38 E. 11 yds. dist.; thence S. E. with said boundary 2,200 yds. to the place of beginning, containing 1,000 acres.

Together with all and singular the rights, members, hereditaments and appurtenances unto the same belonging or in anywise appertaining. To have and to hold all and singular the premises above mentioned unto the said William Grigsby, as executor aforesaid, for the use and benefit of the heirs of the said Crawford Grigsby, dec'd, forever; and I, the said Balis Edens as administrator as aforesaid, do hereby bind myself to warrant and forever defend all and singular the said premises unto the — William Grigsby, as executor aforesaid, for the use and benefit of the heirs of said Crawford Grigsby, dec'd, in as full and ample a manner as I, the said Balis Edens, as administrator as aforesaid, could or ought to do.

77

In witness whereof, I have hereunto, as said administrator, set my hand and scroll for seal this the 17th day of July, A. D., one thousand eight hundred and forty-seven, (1847.)

BALIS EDENS, [SCROLL.]
Administrator John Grigsby, Dec'd.

Signed and sealed and delivered in presence of—
GEO. W. TUGGLE.
D. H. EDENS.

THE STATE OF TEXAS, }
Anderson County. }

Personally appeared before the undersigned Darius H. Edens, one of the subscribing witnesses to the foregoing deed; who, after being duly sworn, says upon oath that he was present and saw Balis Edens, whose signature and seal appears to the above instrument, sign, seal and execute the same for the purposes and considerations therein set forth and expressed.

Witness my hand and seal of office, in the town of Palestine, this 6th day of Dec., A. D. 1847.

JOHN GRIGSBY,
C. C. C., A. C.

78 Filed for record Aug. 22d, 1873, Book "U," page 390.
J. M. LAWS, *Clerk*,
By J. W. JACKSON, *Dep'y.*

To the admission of which copy of deed in evidence the plaintiff, by his counsel, objected, because the said deed purports to have been executed under the authority of the aforesaid order of the probate court of Houston county, Texas, at its March term 1847, and it does not conform to said order in this, that the said order authorizes said administrator to execute to the heirs of Crawford Grigsby, a conveyance of an undivided interest to the extent of one thousand acres, third choice, in the John Grigsby league and labor survey, and said deed conveys a specific tract of one thousand acres described by metes and bounds, in said league and labor survey, and said administrator did not have the authority to make the deed offered in evidence.

And second, because it appears from said deed, taken in connection with other testimony already in evidence before the court, that John Grigsby, clerk of the county court of Anderson county, Texas, before whom said deed was authenticated for record, was one of the devisees of the estate of Crawford Grigsby, and as such, was interested in said deed, and could not lawfully take the proof of same for record, and was therefore inadmissible as a recorded deed; which objections were by the court overruled and said deed admitted in evidence and read to the jury over the objections of the plaintiff; to which ruling of the court the plaintiff, by his counsel, then and there duly excepted.

79 Be it further remembered that the defendants also offered in evidence the following certified copy of a deed from Wm. Grigsby, executor of the estate of Crawford Grigsby, deceased, to the several devisees under the will of Crawford Grigsby, to wit:

THE STATE OF TEXAS, }
County of Anderson. }

Know all men by these presents, that, whereas, the following order was made at the May term, A. D. 1847, of the probate court of said county, to wit: Ordered by the court that the heirs, who are of lawful age, of Crawford Grigsby, dec'd, and guardian for the minors James and Robert Grigsby, be and they are hereby authorized and empowered to proceed and make an equal division among themselves (if that can be done satisfactorily), the following land belonging to said deceased, to wit: 1,000 acres the headright of John Grigsby, dec'd. Also 640 acres San Jacinto claim, and 320 acres a soldier's claim, lying in Dallas county; and it is further ordered that after said division is made, that the executor, William Grigsby be and he is hereby authorized and empowered to make conveyances to said heirs, and it is further ordered that the executor is hereby requested and authorized to recognize Balis Edens and Wm. P. Mead as partitioners, in place of their wives Ruth Ann Edens and Elizabeth Mead; and, whereas, the aforesaid partition having been made in accordance with the above-recited order, and was returned at the November term, A. D. 1847, of the probate court of said Anderson county and confirmed at the said term of said court, and the executor of said Crawford Grigsby, dec'd, fur-

ther authorized to invest in the legal heirs of said Crawford Grigsby, deceased, the right and title to the several portions allotted
80 each in said partition, and the following-described tracts or parcels of land having been apportioned to the several heirs, to wit: Lots 1, 2 and 5, each containing 160 acres, to William Grigsby, and John Grigsby and Elizabeth Mead (formerly Grigsby) to be disposed of as they may think proper, said land being part of a 640-acre donation claim donated to said Crawford Grigsby, deceased, for having fought in the battle of San Jacinto, located and surveyed, and what was formerly Nacogdoches but now Dallas county, and being sur. No. 27 and bounded as follows:

Beginning at the N. E. cor. of said sur. No. 27 at a stake in the line of William Grigsby's 640-acres sur. in a prairie from which a cotton-wood 20 in. in dia. brs. N. 60 W. 211⅓ vrs. and 2 lone p. o. 14 and 16 in. in dia. respectively brs. S. 15 d. 10 m., E. 161 vrs. dist.; thence N. 45 W. with the line of said sur. No. 27 1,440 vrs., to a stake in the prairie; thence S. 45 W. 1,900 to a stake in a prairie from which an ash 18 in. in dia. brs. N. 82½ W. 210 vrs.; thence S. 45 E. 1,440 vrs. to a stake in the N. W. line of sec. No. 25 made by James A. Sylvester at a point $\frac{2}{1^{2}}$ vrs. N. E. of the S. cor. of Crawford Grigsby's 640-acre survey No. 27; thence N. E. with the line of said sur. No. 25 to the N. E. cor. of a stake from which b. j. 12 in. in dia. brs. N. 15 W. 132 vrs. and a cotton-wood 26 in. in dia. standing on a branch brs. N. 37½ W. 325 vrs.; thence N. E. with a line of a sur. made for William Grigsby — the place of beginning, including lots 1, 2 and 3 in the partition sur. of said donation claim, containing in all 480 acres, and also the following-described tract, having been apportioned to James and Robert H. Grigsby, minors, to wit: Lot No. 5 in the partition sur. being a part of the aforesaid sur. No. 27 and a part of a 320-acre sur. a soldiers's claim No. 28. Beginning at a stake in the prairie
81 the N. cor. of sur. No. 27 and the E. cor. of a 1,476-acre sur. made for Miles Bennet from which a cotton-wood 12 in. brs. N. 45 W. 270 vrs. and a persimmon 10 in. brs. N. 39 W. 263 vrs.; thence S. 45 W. with the S. E. boundary of said Bennett's sur. passing the W. cor. of a 640-acre sur. No. 27 made for Crawford Grigsby at 1,971 vrs. to the S. cor. of said Bennett sur. and at the W. cor. of sur. No. 28 a stake from which a p. o. 25 in. brs. N. 78 W. 58 vrs. and a p. o. 18 in. brs. S. 55 W. 2½ vrs.; thence S. 45 E. 1,000 vrs., to a stake in the S. W. line of 320-acre sur. No. 28 of Crawford Grigsby from which an ash 8 in. brs. N. 46 W. 13½ vrs. and a p. o. 11 in. brs. S. 32½ E. 9½ vrs.; thence N. 45 E. 1,000 vrs. to a stake in the S. W. line of 160-acre lot N. 3 or 480-acre tract apportioned to John and William Grigsby and Elizabeth Mead; thence with said line N. 45 W. 480 vrs. to a stake the W. cor. of said 480-acre tract or lot No. 3 from which an ash 18 brs. N. 82½ W. 210 vrs.; thence N. 45 E. with the N. W. boundary of said 480-acre tract or lot No. 3, 2 and 1, in all 1,900 vrs. to a stake the N. cor. of said 480-acre tract or lot No. 1; thence N. 45 W. 451 vrs. to the place of beginning, containing 320 acres, and the following tract having been apportioned to John Grigsby, to wit: Lot No. 2 in the partition sur., it being a

part of the headright league of John Grigsby, deceased, located and surveyed in what was Nacogdoches but now Dallas county, and a part of the 1,000-acre tract deeded to the heirs of Crawford Grigsby by Balis Edens, administrator of John Grigsby deceased, beginning at a stake in N. W. boundary of John Parker's sur. and at the S. E. cor. of lot No. 1, from which a p. o. 20 in. brs. S. 82 E. 7 vrs. and a p. o. 18 brs. S. 87 W. 4 yds.; thence N. 45 E. 1,069½ yds. with said Parker's N. W. boundary to a stake from which a pecan 12 in. brs. S. 14 W. 7 yds. and a cedar 14 in. brs. N. 61 E. 7½ yds.;
82 thence N. 45 W. 733⅓ yds. to a stake in the N. E. boundary line of the 1,000-acre sur. for the heirs of Crawford Grigsby, deceased, from which a p. o. 16 in. brs. N. 56 E. 38½ yds. and a p. o. 16 in. brs. N. 76 E. 52 yds.; thence S. 45 W. 1,069 yds. to a stake from which a b. j. 5 in. brs. S. 32 W. 4 yds. and a b. j. 8 in. brs. N. 72 E. 6 yds; thence S. 45 E. 733⅓ yds. to the place of beginning, containing 162 acres, and the following tract having been apportioned to William Grigsby, to wit: Lot No. 3 a part of the same tract of the aforesaid lot 2 apportioned to John Grigsby: Beginning at the N. cor. of lot No. 1 and the W. cor. of lot No. 2; thence N. 45 E. 1,069½ yds. to a stake at the N. E. cor. of lot No. 2; thence N. 45 W. 723⅓ yds. with the N. E. boundary of said 1,000-acre sur. to a stake from which a p. o. 30 in. brs. S. 36 E. 16⅓ yds. and a p. o. 30 in. brs. N. 67 W. 18 yds.; thence S. 45 W. 1,069½ yds. to a stake from which a p. o. 8 in. brs. S. 20 E. 3½ yds. and a p. o. 8 in. brs. N. 44 E. 6½ yds.; thence S. 45 E. 733⅓ yds., to the beginning cor., containing 162 acres of land, and the following tract having been apportioned to Elizabeth Mead (formerly Grigsby) to wit: Lot No. 4, a part of the same tract of lands as lots No. 2 and 3.

Beginning at a cedar in the S. W. boundary of John Grigsby headright grant and at the W. corner of lot No. 1; thence N. 45 E. 1,151½ yds. to a stake at the N. corner of lot No. 1 and the W. cor. of lot No. 2 and the S. cor. of lot No. 3; thence N. 45 W. 733⅓ yds. to the W. cor. of lot No. 3; thence S. 45 W. 1,110½ yds. to the S. W. boundary of said John Grigsby's headright grant to a stake from which a p. o. 10 in. brs. 40 E. 4½ yds. and a p. o. 10 in. brs. N. 88 E. 12 yds.; thence S. E. with said S. W. boundary of John Grigsby's headright grant 733⅓ yds. to the place of beginning, containing 161 acres, and the foregoing tract having been apportioned to
83 James and Robert H. Grigsby, minors, to wit: Lot No. 5, a part of the same tract of land as lots No. 2, 3 and 4. Beginning at the W. corner of lot No. 4 in the S. W. boundary of said John Grigsby headright sur.; thence N. 45 E. 2,180 yds. to the N. cor. of lot No. 3; thence N. 45 W. 733⅓ yds. to the N. cor. of said 1,000-acre sur. a stake from which a p. o. 12 in. brs. N. 86 E. 8½ yds. and a p. o. 18 in. brs. S. 85 E. 5½ yds.; thence S. 45 W. with the boundary of said 1,000-acre tract 2,139 yds. to a stake in the S. W. boundary line of said John Grigsby grant from which a p. o. 5 in. brs. N. 65 E. 4 yds. and a p. o. 20 in. brs. N. 38 E. 11 yds.; thence S. E. with said boundary 733⅓ yds. to the place of beginning, containing 327 acres.

Therefore be it known that I, William Grigsby, as executor of

Crawford Grigsby, dec'd, by virtue of the above and foregoing order of the probate court of said Anderson county, do by these presents relinquish and convey unto the said William Grigsby and Elizabeth Mead (formerly Elizabeth Grigsby) and John Grigsby and William Grigsby as guardian for James and Robert H. Grigsby, minor heirs of Crawford Grigsby, dec'd, all of whom are legal heirs of said Crawford Grigsby, dec'd, all the right, title, claim and interest that the estate of Crawford Grigsby has in and to the aforementioned and described tracts or parcels of land. Together with all and singular the rights and privileges, members, hereditaments and appurtenances to the same belonging or in anywise appertaining, and I, the said William Grigsby, do hereby bind myself, my heirs, executors and administrators, as executor as aforesaid, to warrant and forever defend the title to the aforesaid land and premises unto William Grigsby, Elizabeth Mead and John Grigsby, heirs as
84 aforesaid; and unto the said William Grigsby, as guardian of James and Robert H. Grigsby, minors as aforesaid, and I do hereby invest in the aforesaid heirs the full right and title to the aforesaid lots or tracts of land as apportioned to each in this instrument, and I do hereby bind myself as the executor of said Crawford Grigsby, dec'd, to defend the titles to the aforesaid portions unto said heirs as against the claim or claims of the heirs of the said John and Crawford Grigsby, dec'd.

In testimony of all of which, I, the said William Grigsby, as executor aforesaid, have hereunto set my hand and scroll by way of seal, this 1st day of December, one thousand eight hundred and forty-seven (1847).

[SEAL.] WILLIAM GRIGSBY,
Executor of Crawford Grigsby, Dec'd.

Test:
D. H. EDENS.
JAMES R. FULTON.

THE STATE OF TEXAS,)
County of Anderson.)

Personally appeared before the undersigned, William Grigsby, whose signature and seal appears to the preceding deed or relinquishment from William Grigsby as executor of Crawford Grigsby, dec'd, to the heirs of said Crawford Grigsby, dec'd, and acknowledged that he signed, sealed and executed the same for the conditions and purposes therein set forth and expressed and that it was his free and voluntary act.

In witness whereof, I hereunto set my hand and seal of office at Palestine, this 6th day of Dec., A. D. 1847.

[L. S.] JOHN GRIGSBY,
C. C. C., A. C.

Filed in my office on the 11th day of Dec., A. D. 1847, at 2
85 o'clock p. m., and duly recorded in the records of said court on pages 23, '4, '5, '6, Book B, this 11th day of Dec., 1847.

WM. M. COCHRAN,
C. C. C., D. C., T.,
By J. C. McCOY, *Deputy.*

To the admission of which deed in evidence, the plaintiff, by his counsel, objected, because said deed shows upon its face that it has never been duly registered, in this, that John Grigsby is one of the grantees in said deed, and the same was acknowledged by the grantor before him, as clerk of the county court of Anderson county, Texas, and the authentication being void for this reason, the deed was never legally registered; which objection was by the court overruled, and said copy of deed admitted in evidence and read to the jury over the objections of the plaintiff, to which ruling of the court the plaintiff, by his counsel, then and there duly excepted.

Be it further remembered that after the conclusion of the testimony in this cause, the court instructed the jury that as the decree of the probate court of Houston county, Texas, at its March term 1847, divested the title to the tract of one thousand acres of land of which the land described in plaintiff's petition is a part, out of the estate of John Grigsby, and vested it in the estate of Crawford Grigsby, therefore the plaintiff had failed to show any title in himself, and to return a verdict for the defendants, to which charge of the court, the plaintiff, by his counsel, then and there duly excepted.

Be it further remembered that on said trial, plaintiff, by counsel, asked the witness L. G. Aspley, what relation or connection the John Grigsby, who was county clerk of Anderson county, Texas, in 1847, was to the John Grigsby to whom the land in contro-
86 versy was patented, and the John Grigsby who was a brother to Crawford Grigsby and one of his devisees; to which the defendants by counsel objected, because said testimony is irrelevant and immaterial, which objection was by the court sustained and the answer of said witness excluded; to which question the witness would have answered that the John Grigsby who was county clerk of Anderson county in 1847, was a son of John Grigsby to whom the league and labor of land in Dallas county was patented, and was a brother of the whole blood to Crawford Grigsby and one of the devisees under his will.

To which ruling of the court in excluding the answer of said witness, the plaintiff by his counsel, then and there excepted.

And to perpetuate the said several rulings of the court, and the exceptions of the plaintiff thereto, the plaintiff, by his counsel, now here tenders this his bill of exceptions to all of said rulings and asks that the same be signed, sealed, filed, enrolled and made a part of the record in this cause, which is hereby accordingly done, this February 24th, A. D. 1892.

T. S. MAXEY, *Judge.*

The foregoing has the following endorsement to wit:—No. 1390, C. R. F. Aspley *vs.* J. P. Murphy *et al.* Plaintiff's bill of exceptions. Filed Febr'y 25, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

87 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

R. F. Aspley
vs.
J. P. Murphy *et al.* } 1390, C. Assignment of Errors.

Now comes the plaintiff, R. F. Aspley, by his counsel, and says that in the record and proceedings in the above entitled and numbered cause, there is manifest error in this, to wit:

1st. That the trial court erred in admitting in evidence over the objections of the plaintiff, the order or decree of the probate court of Houston county, Texas, made at its March term, A. D. 1847, and dated March 29th, A. D. 1847, in the course of the administration on the estate of John Grigsby, deceased, which attempted to decree specific performance of a contract to convey land, claimed to have been made between John Grigsby in his lifetime and Crawford Grigsby in his lifetime, and in about the year 1840 or the year 1841, in which the said John Grigsby agreed to convey to said Crawford Grigsby one thousand acres of land out of his, said John Grigsby's headright survey of one league and labor, when thereafter located, in consideration that said Crawford Grigsby would locate, survey and have patented said headright certificate; and authoriz-
88 ing and requiring the administrator of the estate of said John Grigsby, deceased, to make a conveyance to the heirs of said Crawford Grigsby, dec'd, of one thousand acres of land, third choice, in said John Grigsby headright survey of one league and labor; because said order or decree, was and is null and void, in this, that said probate court, at the time it attempted to make said order or decree, did not have, under the laws of the State of Texas, then in force, jurisdiction to decree the specific performance of contracts to convey land, which had been entered into by a decedent during his lifetime.

2nd. That the trial court erred in admitting in evidence over the objections of the plaintiff, the above-described order or decree of the probate court of Houston county, because said order, and the other proceedings of said probate court, had and made in course of administration on the estate of said John Grigsby, dec'd, show upon their face that said pretended contract, if ever made by said parties, as claimed, was a verbal contract or agreement, and was not in writing; and said probate court at the time it attempted to make said order or decree, did not have, under the laws of the State of Texas then in force, jurisdiction to decree the specific performance of parol contracts or agreements to convey lands, which had been entered into by a decedent during his lifetime.

3rd. That the trial court erred in admitting in evidence over the objections of the plaintiff, the above-described order or decree of the probate court of Houston county, because said order, and the other proceedings of said probate court, had and made in course of administration on the estate of said John Grigsby, dec'd, show upon their face, that said claim against said estate was presented
89 to, and was allowed and accepted by Balis Edens, the administrator of said John Grigsby's estate, and that at the time that he so allowed and accepted said claim as a demand against said estate, said administrator was interested in said claim or contract, adversely to the interest of said John Grigsby's estate, which he then represented, in this, that he was the husband of Ruth Ann Grigsby, who was a sister of the whole blood to said Crawford Grigsby, and one of the devisees under the will of said Crawford Grigsby; and therefore said administrator was in law disqualified from acting on said claim, and the order or decree of said probate court, based on said illegal and void acceptance and allowance by said administrator aforesaid, was also null and void.

4th. That the trial court erred in admitting in evidence over the objections of the plaintiff, the above-described order of the probate court of Houston county, because said order only attempted and purported to establish the equitable right of the estate of Crawford Grigsby, dec'd, to an undivided interest, to the extent of one thousand acres, in said John Grigsby league and labor survey, as tenant in common with the estate of John Grigsby, dec'd, and such equitable right or title cannot avail the defendants in this action at law.

5th. That the trial court erred in admitting in evidence over the objections of the plaintiff, the certified copy of the deed of conveyance from Balis Edens, administrator of the estate of John Grigsby, dec'd, to William Grigsby, executor of the estate of Crawford Grigsby, dec'd, dated July 17th, 1847, conveying to him for the use and benefit of the heirs of said Crawford Grigsby, dec'd, one thousand acres of land by metes and bounds, out of the said John Grigsby
90 headright survey of one league and labor; and which said deed was proved up for record before John Grigsby, county clerk of Anderson county, Texas, on the 6th day of December, 1847; because said deed does not conform to said order of probate court in this, that said deed attempts to convey a specific tract of one thousand acres of land, by metes and bounds, in said league and labor survey, and said order only authorized said administrator to convey an undivided interest to the extent of one thousand acres, in said league and labor survey, and therefore said deed was without authority and void.

6th. That the trial court erred in admitting in evidence over the objections of the plaintiff, the last above described deed of conveyance from Balis Edens, administrator, to William Grigsby, executor, because, the original of said certified copy was never duly registered as required by law, in this, that said deed was proved up for record before John Grigsby, county clerk of Anderson county, Texas, on the 6th day of December, 1847, and at that time said John Grigsby was a brother of the whole blood to said Crawford Grigsby, deceased,

and was one of the devisees under the will of said Crawford Grigsby and as such was interested in said conveyance as one of the persons for whose use and benefit it was made, and was prohibited by law from authenticating said deed for record.

7th. That the trial court erred in admitting in evidence over the objections of the plaintiff, the certified copy of the deed of conveyance in partition, from William Grigsby, executor of the estate of Crawford Grigsby, deceased, to the several devisees under the will of said Crawford Grigsby, deceased, conveying to each of them the
the several tracts of land, into which said thousand-acre tract
91 had been divided among the several devisees, dated December 1st, 1847, and acknowledged for record by the maker, William Grigsby, executor, before John Grigsby, county clerk of Anderson county, Texas, on the 6th day of December, 1847, because said John Grigsby, who took said acknowledgement, was one of the grantees in said deed, and was interested therein, and therefore could not lawfully authenticate the same for record; and such authentication being void, said deed was never duly registered as required by law.

8th. That the trial court erred in sustaining the objection of the defendants, because it was irrelevant and immaterial, to the testimony of the witness, L. G. Aspley, and excluding said testimony, which was to the effect that the John Grigsby who was the county clerk of Anderson county, Texas, in 1847, was a son of the John Grigsby to whom the league and labor of land in Dallas county, Texas, was patented, and was also a brother of the whole blood to Crawford Grigsby, and one of the devisees under his will; because said testimony was relevant and material to show that John Grigsby, the officer before whom both of the hereinbefore-described deeds were authenticated for record, was the same John Grigsby who was one of the devisees under the will of Crawford Grigsby, and thereby interested in both of said deeds, as affecting the questions raised by plaintiff, as to the validity of the registration of said deeds.

9th. That the trial court erred in directing the jury to return a verdict for the defendants, on the ground that the order of the probate court of Houston county, Texas, dated March 29th, 1847, hereinbefore described, had divested the title to the land in
92 controversy out of the estate of John Grigsby, deceased, and that therefore the plaintiff could not recover.

Wherefore, the said R. F. Aspley prays that the judgment rendered against him by the United States circuit court for the northern district of Texas, be reversed, and a new trial awarded him.

CHAS. I. EVANS, G. J. GOOCH, AND
BASSETT, SEAY & MUSE,
Att'ys for Plaintiff, R. F. Aspley.

Endorsed: No. 1390, C. R. F. Aspley *vs.* J. P. Murphy *et al.* Assignment of errors. Filed Febr'y 29, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

93 *Petition for Writ of Error.*

UNITED STATES OF AMERICA,
Northern District of Texas.

To the honorable circuit justice and circuit judges of the United States circuit court of appeals for the fifth circuit:

The petition of Robert F. Aspley shows that in the record and proceedings, and also in the rendition of the judgment in the cause between Robert F. Aspley, plaintiff, and J. P. Murphy, C. F. Bolanz, G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Eugene Sweeney, Abe Ashe, Barbara Neis and Cherry Jackson, defendants, No. 1390, C, tried in the circuit court of the United States for the northern district of Texas, at Dallas, Texas, at the January term thereof, A. D. 1892, in which judgment was rendered against the plaintiff on the 20th day of February, A. D. 1892, manifest error hath intervened, to the great prejudice and damage of the plaintiff.

Wherefore he prays for the allowance of, a writ of error, and such other process as may cause the *the* same to be corrected by the United States circuit court of appeals for the fifth circuit as aforesaid.

CHAS. I. EVANS, G. J. GOOCH, AND
BASSETT, SEAY & MUSE,
Att'ys for Petitioner.

Granted M'ch 3, '92.

T. S. MAXEY, *Judge.*

The foregoing has the following endorsement, to wit:

No. 1390 C. R. F. Aspley *vs.* J. P. Murphy *et al.* Petition for writ of error. Filed M'ch 4, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

94 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between R. F. Aspley, plaintiff, and J. P. Murphy, C. F. Bolanz, G. M. Danover, L. D. Douglas, J. M. Harry, D. C. Harry, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Eugene Sweeney, Abe Ashe, Barbara Neis, and Cherry Jackson, defendants, a manifest error hath happened, to the great damage of the said R. F. Aspley, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at the city of New Orleans, in the State of Louisiana, in not exceeding thirty days from the 3rd day of March, A. D. 1892, the next term of said court to be held on the fourth Monday in May next, in the said United States circuit court of appeals for the fifth circuit, to be then and there held, that, the record and proceedings being inspected, the said United States circuit court of appeals for the fifth circuit
95 may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 4th day
[SEAL.] of March, in the year of our Lord, one thousand eight hundred and ninety-two.

J. H. FINKS,
Clerk of the Circuit Court of the United States,
By CHAS. H. LEDNUM, *Deputy.*

Allowed March 3, 1892.

T. S. MAXEY, *Judge.*

Endorsed: No. 1390 C. R. F. Aspley *vs.* J. P. Murphy *et al.* Writ of error. Filed March 4, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

96 UNITED STATES OF AMERICA:

To J. P. Murphy, C. F. Bolanz, G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Eugene Lweeney, Abe Ashe, Barbara Neis and Cherry Jackson, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fifth circuit, to be holden at the city of New Orleans, State of Louisiana, within 30 days from third day of March, 1892, the regular term of said court to be holden on the fourth Monday of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein R. F. Aspley is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the — day of ——, A. D. 1892.

Signed this 3rd day of March, 1892.

T. S. MAXEY, *Judge.*

Endorsed: No. 1390 C. R. F. Aspley *vs.* J. P. Murphy *et al.* Citation in error. We hereby accept service of the within citation for all the within-named defendants. March 4, 1892. Simkins & Morrow, att'ys of record. Filed M'ch 4, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

97 *Writ of Error Bond.*

Know all men by these presents, that we, R. F. Aspley, and —— —— are held and firmly bound unto J. P. Murphy, C. F. Bolanz, G. M. Danover, L. D. Douglas, J. M. Harry, D. C. Harry, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Eugene Sweeney, Abe Ashe, Barbara Neis and Cherry Jackson, their certain attorney, executors, administrators, or assigns, in the just and full sum of one thousand dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 29th day of February, in the year of our Lord, one thousand eight hundred and ninety-two.

Whereas, lately at a term of the circuit court of the United States, for the northern district of Texas, at Dallas, Texas, in a suit pending in said court between Robert F. Aspley, plaintiff, and J. P. Murphy, C. F. Bolanz, G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Eugene Sweeney, Abe Ashe, Barbara Neis and Cherry Jackson, defendants, numbered 1390 C on the docket of said court, a judgment was rendered against the said R. F. Aspley, on the 25th day of February, A. D. 1892, that he take nothing by his suit, and that the said defendants recover of him all costs of suit; and the said R. F. Aspley having obtained a

98 writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said J. P. Murphy, C. F. Bolanz, G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, G. M. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Eugene Sweeney, Abe Ashe, Barbara Neis and Cherry Jackson, citing and admonishing them to be and appear at a United States court of appeals for the fifth circuit, within thirty days from the third day of March, A. D. 1892, the regular term of said court to be holden at the city of New Orleans, State of Louisiana, on the 4th Monday of May next.

Now the condition of the above obligation is such, that if the said R. F. Aspley shall prosecute his writ of error to effect and answer all costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

R. F. ASPLEY,
By CHAS. I. EVANS, *Att'y.*
WM. H. GARRETSON.
W. C. HOWARD.

Approved this March 3, 1892.

T. S. MAXEY, *Judge.*

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that in my opinion, the security offered by the securities Wm. H. Garretson and W. C. Howard, on the foregoing is good and ample security for the penalty thereof and that if the bond was offered to me for approval that I would approve the same.

99 Witness my hand and seal of office, at Dallas, Texas, this Febr'y 29th, 1892.

[SEAL.] J. H. FINKS, *Clerk,*
By CHAS. H. LEDNUM, *Deputy.*

The plaintiff in error has this day filed in this court in the above cause his assignment of errors. February 29, 1892.

[SEAL.] J. H. FINKS, *Clerk,*
By CHAS. H. LEDNUM, *Deputy.*

The foregoing has the following endorsement, to wit:
No. 1390 C. R. F. Aspley *vs.* J. P. Murphy *et al.* Writ of error bond. Filed M'ch 4, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

100 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record in cause No. 1390 C, wherein R. F. Aspley is plaintiff and J. P. Murphy *et al.* are defendants, except that the original citation in and writ of error are included therein instead of the copies thereof, as fully as the same remains on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said court, at
[SEAL.] Dallas, Texas, this 9th day of March, 1892.

J. H. FINKS, *Clerk,*
By CHAS. H. LEDNUM, *Deputy.*

Filed March 28, 1892.

J. M. McKEE, *Clerk.*

101 On the 2nd day of June, 1892, the following proceedings were had in said cause:

Extracts from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error.

This cause was regularly called this day, and, after argument by P. H. Bassett, Esq., for plaintiff in error, and by S. W. Simkins, Esq., for defendants in error, further argument was continued until tomorrow.

And on June 3rd, 1892, the following proceedings were had:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et al.*, Defendants in Error.

After argument, in conclusion, by Mr. Simkins, for defendants in error, and by Chas. I. Evans, for plaintiff in error, this cause was submitted to the court upon briefs of the counsel.

And on June 20th, 1892, same being a day of the said November term, 1891, the following proceedings were had:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY, C. F. BOLANZ, G. M. DANOVER, L. D. DOUGLASS, J. M. Harry, D. C. Harry, G. H. Langsdale, Josie R. Motley, D. H. Morrow, T. W. Scollard, Henry Hamilton, Eugene Sweeney, Abe Ashe, Barbara Neis, and Cherry Jackson, Defendants in Error.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern
102 district of Texas, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

It is further considered and so ordered and adjudged that the plaintiff in error, Robert F. Aspley, and Wm. H. Garretson and W. C. Howard, sureties on the writ of error bond herein, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

And on June 23d, 1892, a motion was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals for the Fifth Circuit.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error. } No. 30.

Now comes the plaintiff in error, by his counsel, and respectfully shows to the court that he has been aggrieved by the judgment and opinion of this court, affirming the judgment of the court below, and he desires to submit a petition for a rehearing, but that by rule 29 of this court such petition can be presented only at the term of court at which the judgment is entered, unless by special leave of the

court granted during such term, and that he fears and believes that there will not be sufficient time to obtain a copy of the opinion of the court and prepare such petition for rehearing with such a statement of the grounds for rehearing as is necessary and for having the same printed, in compliance with the rules of court be-
103 fore the adjournment of the present term of the court.

Wherefore he prays for special leave to prepare and file such petition for rehearing, after the adjournment of the term and within such reasonable time to enable him to prepare the same in accordance with the rules of court, as to the court may seem meet and proper under the circumstances.

(Signed) CHAS. I. EVANS,
Counsel for Pl'tff in Error.

And on said 23rd day of June, 1892, the following proceedings were had in said cause:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error.

On this day came on to be heard motion of plaintiff in error for leave to file petition for rehearing herein after the adjournment of the present term of this court.

On consideration whereof it is ordered that plaintiff in error be allowed to file a petition for rehearing within sixty drays from this date, and that plaintiff in error shall serve a copy of said petition on defendants in error or their attorneys of record before the expiration of said sixty days.

And on the 22nd day of November, 1892, the same being a day of the November term, 1892, of said United States circuit
104 court of appeals, the following proceedings were had in the cause:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error.

The petition for rehearing was this day submitted to the consideration of the court.

And on the 5th day of December, 1892, the following proceedings were had in said cause:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error,

Ordered that the rehearing applied for herein be refused, and that mandate may issue.

And on the 8th day of December, 1892, plaintiff in error filed his application for a certificate to the Supreme Court of the United States, in the words and figures following, to wit:

R. F. ASPLEY, Pl't'ff in Error,
v.
J. P. MURPHY *et als.*, Def'ts in Error. } No. 30.

In the United States Circuit Court of Appeals for the Fifth Circuit.

To the hon. the judges of said court:

Now comes the plaintiff in error, R. F. Aspley, and prays the court to certify to the Supreme Court of the United States the questions or propositions of law involved in this cause, requesting the instructions of said Supreme Court concerning said questions, or for such consideration by said court as it may determine to
105 be necessary and proper for attaining the justice of the matters therein involved, as is provided for in section six of the act of Congress of the United States entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3rd, 1891. And, as in duty bound, petitioner will ever pray, &c.

(Signed) ROB'T F. ASPLEY,
By CHAS I. EVANS,
His Att'y of Record.

On the 12th day of December, 1892, the following proceedings were had in said cause, to wit:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error.

On application of the plaintiff in error to certify questions in the case to the Supreme Court.

Order.

Considering that the questions involved in the cause relate to the title to land and are purely local, and that the conclusion reached by the circuit court for the northern district of Texas has been fully

concurred in by the three judges constituting this court, and the decree rendered by said circuit court has been in its entirety affirmed by this court,—

It is ordered that said application be refused.

106 And on the 8th day of May, 1893, the plaintiff in error filed his petition for a writ of error to the Supreme Court of the United States, in the words and figures following, to wit:

In the U. S. Circuit Court of Appeals for the Fifth Circuit.

ROB'T F. ASPLEY
v.
J. P. MURPHY *et als.* } No. 30.

To the honorable the circuit justice and circuit judges of the United States circuit court of appeals for the fifth circuit:

The petition of Robert F. Aspley shows that in the rendition of the judgment of this honorable court affirming the judgment of the United States circuit court for the northern district of Texas, at Dallas, Texas, in the cause between Robert F. Aspley, plaintiff, and J. P. Murphy, C. F. Bolanz, G. M. Danover, L. D. Douglass, J. M. Harry, D. C. Harry, G. H. Langsdale, Josie R. Motley, D. H. Morgow, T. W. Scollard, Henry Hamilton, Eugene Sweeney, Abe Ash, Barbara Neis, and Cherry Jackson, defendants, No. 30 on the docket of said United States circuit court of appeals, and tried therein and judgment of affirmance rendered against said Robert F. Aspley on the — day of June, A. D. 1892, and his petition for a rehearing therein denied by said court on the 12th day of December, A. D. 1892, said United States circuit court of appeals hath committed manifest error, to the great prejudice and damage of petitioner, for the reasons stated in his assignment of errors filed in the court below and contained in the record of said cause.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

(Signed) CHAS. I. EVANS,
Attorney for Petitioner.

107 On the 22nd day of May, 1893, the following proceedings were had in said cause:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error.

This day the petition of the plaintiff in error for the issuance of a writ of error was submitted to the court.

On the 23d day of May, 1893, being a day of the November term, 1892, of said United States circuit court of appeals for the fifth circuit, the following proceedings were had in said cause:

Extract from the Minutes.

ROBERT F. ASPLEY, Plaintiff in Error,
v.
J. P. MURPHY *et als.*, Defendants in Error.

Ordered that the petition of Robert F. Aspley for a writ of error to the Supreme Court of the United States be, and the same is hereby, denied.

108 *Opinion of the Court.*

United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1891.

ROBERT F. ASPLEY, Plaintiff in Error,
versus
J. P. MURPHY *et als.*, Defendants in Error. } No. 30.

Error to the circuit court of the United States for the northern district of Texas.

Before Pardee, circuit judge, and Locke and Billings, district judges.

BILLINGS, district judge, delivered the opinion of the court:

This case is before this court upon a writ of error to the circuit court of the United States for the northern district of Texas. The suit was an action of trespass to try title, brought by the plaintiff in error against the defendants in error to recover an undivided interest in a block of ground situate in the city of Dallas. There was a trial by jury, and there is a bill of exceptions as to the admission of a deed offered in evidence by the plaintiff below. The bill of exceptions presents several grounds of exception to the admission of the deed. But one ground was insisted on in the argument, and that presents the question, "In the year 1847 had the probate courts of the State of Texas the power to authorize an administrator to make a deed in satisfaction or payment of a claim for land due by his estate where the administrator accepted the claim and
109 the court upon evidence taken approved it?" The record shows that the facts in the case bearing upon this question were as follows:

John Grigsby died in March, 1841. In February, 1847, the administrator of his estate, the administration of which was pending in the probate court of Houston county, upon a petition which represented that Crawford Grigsby had in the lifetime of the decedent a contract with him whereby he was entitled to a conveyance of 1,000 acres out of tract in said petition described; that said Crawford Grigsby was also deceased and his estate was represented by an

executor, who represented the heirs; after a hearing and upon proo having been offered, obtained the following order: "That he be and is hereby, authorized and required to make a deed to the heir of Crawford Grigsby, deceased, for one thousand acres of land, agreeable to the contract as proven."

In pursuance of this order the deed was made.

The question is, Had the probate court the authority to make the order? The statute of 1844, entitled "An act to define and fix the practice of probate courts in certain cases," in section 2, 1 Sayles' Early Laws of Texas, art. 1341, provided as follows:

SEC. 2. That, whenever there may be outstanding bonds, obligations or contracts in writing for the conveyance of land or tenements against the estate of any deceased person, which it may be to the interest of said estate shall be lifted or complied with, it shall be the duty of the probate court, where the succession was opened, or where the same was or may be administered upon an application by petition of the executor or executrix, administrator or administratrix, or guardian, where all the heirs are minors, and have such guardian, after full proof of the existence of such bonds, obligation or contract, in writing, and upon satisfactory evidence that a compliance with the requirements of said bond, obligation or contract, would be beneficial to the interest of said estate, to decree that the person, thus applying, shall fully comply with the same, and any deed, or tender of deed, made under such decree shall be as valid and binding as if it had been made or tendered by the testator or intestate himself.

No question is made but that this section of the statute above quoted gave the probate courts the power to authorize the deed in question.

The matters to be considered are, 1st, Had this section been repealed? and, 2nd, What other statute, if any, was there in force which authorized it?

1st. As to the repeal:

After the admission of Texas into the Union as a State a constitution, in 1845, was adopted which distributed the probate jurisdiction between the district courts and the inferior or probate courts. The sections which bear upon this matter are (Const. of 1845) art. IV, secs. 1 and 15; Charters and Constitutions, part 2, Texas, pp. 1772 and 1773.

SECTION 1. The judicial power of this State shall be vested in one supreme court, in district courts, and in such inferior courts as the legislature may from time to time ordain and establish, and such jurisdiction may be vested in corporation courts as may be deemed necessary, and be directed by law.

SECTION 15. Inferior tribunals shall be established in each county for appointing guardians, granting letters testamentary and of administration, for settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates; and the district courts shall have original and appellate jurisdiction, and general control over the said inferior tribunals, and original jurisdiction and control over execu-

tors, administrators, guardians, and minors, under such regulations as may be prescribed by law.

In art. XIII, sec. 3, it was provided as follows:

Charters and Constitutions, part 2, p. 1781.

SEC. 3. All laws or parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this constitution, shall continue and remain in force as the laws of this State until they expire by their own limitation or shall be altered or repealed by the legislature thereof.

It is thus evident that by force of sect. 3 of art. XIII all the probate laws were continued in force until they should be repealed by the legislature.

The plaintiff in error contends that section 2 of the act of 1844 was repealed by the act of May 11, 1846. This last act is en-
112 titled "An act to organize probate courts," 2 Sayles' Early Laws of Texas, art. 1739. The repealing clause is found in the last section of the act, sec. 27, and is as follows:

SEC. 27. That all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of successions be, and the same are hereby, repealed, and the unfinished business of all estates, now pending, shall be conducted from this date in accordance with the provisions of this act; and this act shall take effect from the second Monday of July next.

(*Post*, art. 2204.)

In the written opinion of the trial judge he reaches the conclusion that the act of 1844 was unrepealed by that of 1846, upon the ground that the decisions of the supreme court of Texas give countenance to the doctrine that this repealing clause was intended by the legislature to include only general laws upon the subject of the settlement of successions, and not to include those provisions of statutes which though they affected the settlement of successions nevertheless, from their evident object, would more properly be designated and classed as statutes under some other head. He refers to Booth *vs.* Todd, 8 Texas, 137, and to Duncan *vs.* Veal, 49 Texas, 613, and to The Land and Cattle Company against Boon, 73 Texas, 554.

Two things, we think, should be suggested in this connection as also tending to establish the conclusion reached by the court below upon the question of legislative intent upon the matter of repeal:

First, the question presented to the court in this case is one as
113 to power or authority which had been conferred by a previous statute and strictly not as to duties of the probate courts; and, secondly, the inquiry whether courts ought not rather than to infer that the legislature intended to sweep away all laws on this subject of the settlement of estates, leaving as a statute law on that difficult and important subject only that brief statute containing the language of repeal, consisting of only 27 sections, to infer that the legislature intended to repeal only the act of Feb'y 5, 1840,

which had for its title the very words used in the repealing clause, being entitled "An act to regulate the duties of probate courts and the settlement of succession," 41 Sayles' Early Laws of Texas, art. 736, and being an act largely relating to forms of procedure in the probate courts, especially since the question presented to us is with reference to the action of a probate court which has been acquiesced in for upwards of 40 years.

If the conclusion reached by the trial judge is correct, that, as matter of legislative intent, it ought to be held that there was no repeal of the act of 1844, then it follows that the court had full power to make the questioned order, and the deed executed in accordance with it was properly admitted in evidence and the record discloses no error. But in a matter so intricate and at the same time so grave and important as the effect of this repealing statute, and in the absence of any direct decision by the supreme court of Texas upon the question as presented here, we have thought it our duty to consider also the question of power or authority in the probate court to make the order in dispute, even under the
114 statute of 1846 alone, and we are of opinion that this statute in itself gives adequate power.

Sections 13, 14, 15, and 16, 2 Sayles' Early Laws of Texas, art. 1739, are as follows:

SEC. 13. That every claim for money, or personal property, or for land, before it can be acknowledged, must be verified by the affidavit of the owner before the judge of probate or a notary public, stating what part is due and unpaid and not satisfied, and when thus verified and presented, the executor or administrator shall endorse thereon his acceptance or rejection with the date of presentation.

SEC. 14. That all claims accepted by executors or administrators shall be presented to the judge, who shall endorse on the same his approval or non-approval.

SEC. 15. That no action shall lie on a claim before its presentation for acknowledgement, but if a claim be rejected by the executor or administrator, or if accepted by him and disapproved by the judge, the owner of such claim may, for the establishment thereof, institute suit against such executor or administrator, before a justice of the peace or the district court of the county where the succession is opened; but no judgment thereon shall give such claim priority, but it shall be paid currently with other claims of the same degree.

SEC. 16. That any party interested in his own right, or as representative in right of another, may by giving security for the costs and damages, appeal to the district court from any judgment,
115 decree or order of the probate court, rendered in term time, within twenty days from the date of said judgment, decree or order; executors, administrators and guardians, and the attorney for the State, may appeal without security.

Section 2 of this act, in the compendium of powers which the probate court shall have either in term time or vacation, recognizes the power "to approve or disapprove of claims acknowledged by an executor, administrator, or guardian."

The substance of sections from 13 to 16, inclusive, is to provide the manner in which a claim for land, &c., shall be verified before presentation. If rejected by the administrator or if accepted by him and disapproved by the judge, the owner may institute suit, according to jurisdiction, in another court.

If, on the other hand, a claim for land, &c., shall be both accepted by the administrator and approved by the judge, any party in interest—*i. e.*, creditor or heir or legatee—may appeal to the district court.

It is an elemental rule of construction that effect is to be given, if possible, to the whole instrument or statute and to every section and clause.

Cooley says (Constitutional Limitations, p. 58): "If different portions seem to conflict the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative rather than one which may make some idle and nugatory."

Unless the construction we have given to the act of 1846 is correct, section 13, so far as claims for land are concerned, would be idle and nugatory.

116 In the light of the history of Texas and Texas lands, of which we must take judicial notice, it seems clear that if the legislature intended to and did repeal the act of 1844 in regard to power of the probate court to set off undisputed claims for land, it must have been intended to give the necessary power to the probate court, constituted under the act of 1846, as otherwise confusion, litigation, and delay would result in the settlement of successions.

Considering the act of 1846 with reference to the other powers and jurisdiction conferred upon the probate court and giving effect, if possible, to the whole law and to every section and clause, the construction we have given the act of 1846 seems necessary. Section 2 of said act fully authorizes and empowers the probate court "to direct the partition of the property of estates." This power could not be exercised with much effect or practical good unless the same court had the power to set off to others than heirs undisputed claims for land.

In this case the forms pursued by the administrator and the heirs of Crawford Grigsby were the forms of the act of 1844—that is, the petition was filed by the administrator and was verified by proof of witnesses taken before the court, but the substance of the procedure was precisely that authorized by the statute of 1846. It comprised the presentation of a claim for land not only verified but established by testimony both as to the contract and its having not been performed by the obligor, accepted by the administrator, and approved by the judge, and it ended in a decree from which any party having an interest might have appealed to the district

117 court. There may have been irregularity as to the witness who made the proof and in the order of the steps taken, but all the safeguards of the statute of 1846 were observed.

There was, though in a different order from that pointed out by that statute, everything which that statute required, viz., the veri-

fication, the acceptance, and the approval, and the thing done—the approval of the claim—was made by a judge in open court who had full authority to make it. We are of opinion that, whether we adopt the conclusion of the trial judge upon the grounds upon which he places it or consider it as we do in connection with the power given to the probate court by the act of 1846 itself, there was no error in the ruling in the court below that the deed was legally authorized and properly admitted in evidence.

There was another point presented by the counsel for the plaintiff in error, as to the authority of the probate court to go further than to recognize an undivided or an equitable interest; but we are of opinion that since the probate court had jurisdiction and authority to approve the claim it had all the power to authorize a deed which, in case of rejection or disapproval, the district court would have had after a decree had been obtained. The order or decree of the probate court was a "direction for the partition of an estate" th-ough a suit brought there, and that the decree could have been attacked only by appeal or in some direct action and not collaterally.

We find no error in the record of the circuit court, and the judgment must be affirmed at the cost of the plaintiff in error.

118 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 119 pages, numbered from *a* to 118, inclusive, contain a true copy of the record, proceedings, and opinion of the court in the case of R. F. Aspley, plaintiff in error, *vs.* J. P. Murphy *et als.*, defendants in error, No. 30, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 9th day of June, A. D. 1893.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.





IN THE SUPREME COURT

OF THE

United States.

OCTOBER TERM, 1893.

ROBERT F. ASPLEY
vs.
J. P. MURPHY ET ALS. } PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert F. Aspley, respectfully shows unto your Honors, that on the 11th day of June, A. D. 1891, he filed his petition, in the ordinary form of Trespass to try Title as prescribed by the Statutes of the State of Texas, in the United States Circuit Court for the Northern District of Texas, at Dallas, Texas, against C. A. Keating, G. M. Danover, L. D. Douglas, J. M. Harry, D. C. Harry, W. H. Prather, A. C. Ardrey, Guy Sumpter, G. M. Swink, J. P. Murphy, Chas. F. Bolanz, J. E. Henderson, G. H. Langsdale, Mrs. Josie Motley, D. H. Morrow, Thomas W. Scollard, J. M. Hays, Henry Hamilton, Eugene Sweeney, Mrs. Barbara Nies, Nat M. Burford, R. L. Burford, Jeff M. Burford,

deceased, be and he is hereby authorized and required to make a deed to the heirs of Crawford Grigsby deceased, for ONE THOUSAND acres of land agreeably to the contract as proven."

The petition signed by Balis Eden, administrator of John Grigsby's estate, on which the foregoing order of the Court is based, is as follows:

"The undersigned administrator of the estate of John Grigsby deceased, begs leave to represent to the Hon Court that said John Grigsby during his life time and about the year 1840 or '41 (eighteen hundred and forty or forty-one) did employ his son Crawford Grigsby, since deceased, to make a selection and locate his, the said John Grigsby's, headright certificate calling for one league and labor of land for which service the said John Grigsby agreed to give said Crawford Grigsby ONE THOUSAND acres of land out of said league and labor, said thousand acres to be third choice land, and also to locate a land warrant belonging to John Grigsby, and calling for SIX HUNDRED AND FORTY acres of land granted to James A. Sylvester for services in the armies of Texas, for the location of which the said John Grigsby agreed to give said Crawford Grigsby TWO HUNDRED acres of land out of said SIX HUNDRED AND FORTY acres, to be average quality. Your petitioner respectfully represents to your Hon. Court that the said Crawford Grigsby did faithfully perform his duty in locating the above named land according to contract, and that the said Crawford Grigsby deceased nor his heirs have ever received the land or any other compensation for

making the aforementioned location. Therefore, your petitioner respectfully prays your Hon. Court that he be allowed and required to execute titles to the heirs of Crawford Grigsby in compliance with the aforementioned agreement, your petitioner as in duty bound will ever pray."

This petition was filed March 29th, 1847, and on the same day the following affidavit was filed, signed by Wm. Grigsby, who was at that time executor of the estate of his brother, Crawford Grigsby, and it was sworn to by him before the clerk of the Probate Court.

"Personally appeared William Grigsby, who being duly sworn, says he is of own knowledge knowing to a contract in the life time between his father and his brother as follows: Crawford Grigsby engaged with his father to locate and survey one League and Labor of land for which service he was to have out of ONE THOUSAND acres, third choice; that his knowing that Crawford Grigsby performed said labor in the life time of his father who has never made a deed to Crawford Grigsby.

Sworn to and subscribed before to the best of his knowledge and belief."

To the admission in evidence of these probate proceedings, and especially to the order of the Probate Court above quoted, decreeing specific performance of the alleged executory contract between John and Crawford Grigsby, your petitioner objected, because:

1.—It appears from the face of said Probate proceedings, that said Probate Court did not have

jurisdiction to make said order or decree at the time when it attempted to do so.

2.—It does not appear from the face of said Probate proceedings that said Probate Court did have jurisdiction to make said order or decree at the time when it attempted to do so.

3.—It appears that said order or decree is void, because the claim on which it was based was allowed by Balis Edens, the Administrator of the Estate of John Grigsby, and who was at the time interested in said claim, his wife, Ruth Ann, being one of the devisees under the will of Crawford Grigsby.

4.—It appears that said order or decree, simply adjudged the right of the estate of Crawford Grigsby deceased, to an undivided interest of One Thousand acres, third choice, in the John Grigsby League and Labor survey, and directed the administrator of the John Grigsby estate to make a conveyance in compliance therewith, thus constituting the estate of Crawford Grigsby a tenant in common to the extent of ONE THOUSAND acres, with the estate of John Grigsby, in said League and Labor survey, which is merely an equitable title or interest therein and cannot avail the defendants in this action at law; all of which objections were by the Court overruled, and said Probate proceedings admitted in evidence and read to the Jury, over the objections of the plaintiff, to which ruling of the Court the plaintiff, by his counsel, then and there duly excepted.

At the conclusion of the testimony, the trial judge instructed the jury, that, as the decree of the

Probate Court above quoted, divested the tract of One Thousand acres of land, of which the land described in plaintiff's petition is a part, out of the estate of John Grigsby, and vested it in the estate of Crawford Grigsby, therefore the plaintiff had failed to show any title in himself, and to return a verdict for the defendants, which was done, and the plaintiff duly excepted thereto.

Your petitioner removed said cause by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, where the judgment of the Court below was affirmed on the 24th day of June, A. D. 1892; and he filed his petition for a rehearing therein in due time, which was overruled without a written opinion on the 12th day of December, 1892; and immediately thereafter petitioner filed with said Court his written request, asking it to certify the questions of law involved in said cause, to this Court for its instruction thereon, which was refused; and on the 23rd day of May, 1893, he presented his petition to said Circuit Court of Appeals praying for a writ of error to remove said cause to this Court for revision and review, which was likewise refused. Petitioner further shows to the Court that the property immediately involved in said suit is of the value of One Million Dollars, but that it is only a small part of a Thousand acres of land, as shown by the record, which is reasonably estimated to be of the value of about thirty million dollars, of which your petitioner's undivided interest, as claimed by him, will not fall short of six millions.

The questions arising in said cause are of great

"AN ACT TO ORGANIZE PROBATE COURTS."

2 Sayles, Early Laws of Texas, Art. 1739; Hart. Dig. p. 348.

The repealing section of this act is, "That all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of successions be, and the same are hereby repealed, and the unfinished business of all estates now pending, shall be conducted from this date in accordance with the provisions of this act."

Hart. Dig. p. 354.

The decision of said Circuit Court of Appeals, that the act of Feb. 2, 1844, was not repealed by the act of May 11, 1846, is in direct conflict with the decision of the Supreme court of Texas in case of

Lewis vs. Ames, 44 Tex. 350,

which decided that the general probate law of Feb. 5th, 1840, was repealed by the general probate law of May 11th, 1846; and as the act of Feb. 2nd, 1844, was but an amendment to the general probate law of Feb. 5th, 1840, said decision of said Circuit Court of Appeals, is also in direct conflict with the decision of this court, in the case of New Jersey Steamboat Co. vs. Alfred Pleasanton, Collector, 18 Wall. 478, where it was decided that the repeal of a prior statute by a subsequent one, without mentioning an amendment to the prior act passed before the repealing statute, also repeals the amendment, because when the original act ceased to exist by its repeal, there was nothing left for the amendment to operate upon.

Said decision of the Circuit Court of Appeals in

said respect, is also contrary to, and directly in conflict with the decisions of the Supreme Court of Texas, in the cases of Bryan vs. Sundburg,

5 Texas, 424;

Rogers vs. Watrous, 8 Tex. 62;

Camley vs. Stanfield, 10 Tex. 549,

and numerous others, to the effect that a subsequent statute which revises the subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied; and where a statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled.

Said decision of the Circuit Court of Appeals on this question, is also contrary to, and in direct conflict with the principles of law laid down by this court in the following cases, viz:

Stewart vs. Kahn, 11 Wall. 493,

where it is held to be an universal rule of law, that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled; and in the case of

Murdock vs. Memphis, 20 Wall. 590,

where it is held that the second section of the act of Congress of Feb. 5th, 1867, relating to the jurisdiction of the Federal Courts, although it contained no repealing clause, nor any express words of repeal, had the effect to repeal the 25th section of the

Judiciary Act of September 24th, 1789. To the same effect are

Davies vs. Fairbairn, 3 How. 636;
United States vs. Tynen, 11 Wall. 88.

Petitioner further shows to the Court, that said decision of the Circuit Court of Appeals, in holding that the legislative intent to confer on the Probate Court, equity jurisdiction to decree specific performance of executory contracts of the decedent to convey land, is to be inferred from the language of sections 13, 14, 15 and 16 of the general probate law of May 11th, 1846, is contrary to, and in direct conflict with the decisions of the Supreme Court of Texas, in the cases of

Jones vs. Taylor, 7 Tex. 240;
Booth vs. Todd, 8 Tex. 137;
Peters vs. Phillips, 19 Tex. 70;
Hooper vs. Hall, 30 Tex. 154;
Houston vs. Killough, 80 Tex. 296;

where it is decided that the rule has ever been adhered to in Texas, that its probate courts could not exercise the jurisdiction to decree the specific performance of executory contracts to convey land, unless the power was expressly given by statute. And said decision on this question, is also in conflict with the decisions of said Supreme Court in the cases of

Wise vs. O'Malley, 60 Tex. 588;
Glassgow vs. McKinnon, 79 Tex. 116;
Mayo vs. Tudor's heirs, 74 Tex. 471;
Withers vs. Patterson. 27 Tex. 491;

and numerous others, where it is decided that the

probate courts of Texas can exercise no power, except what is expressly given to them by the statute.

Said decision in this particular, is also in conflict with the decision of this court in the case of

Bank of Hamilton vs. Dudley, 2 Pet. 492,

where it is decided that the provision in the Constitution of Ohio, investing the Court of Common Pleas with "jurisdiction of all probate and testamentary matters, granting of administration," etc., did not confer on that Court the power to sell lands of a decedent for the payment of the debts of the estate.

Said decision of said Circuit Court of Appeals, in holding that the power to partition lands between joint owners thereof, given in the second section of the general probate law of May 11th, 1846, included the power to decree specific performance of executory contracts to convey land, is also in direct conflict with the decision of the Supreme Court of Texas in the case of

Hooper vs. Hall, 30 Tex. 157,

where this identical question was involved, under the power to partition lands between joint owners, given in section 37 of the general probate law of Feb. 5th, 1840. It that case the Probate Court decreed specific performance of the bond for title held by the creditor, and made partition of the land between him and the heirs. In disposing of the question the Court says: "The proceedings in the County Court of Shelby County for the partition of the Amy Dunman league of land, between Hooper and the Dunman heirs, appear to have been begun un-

der the 37th section of the law of the 5th of February, 1840.

Hart. Dig. Art. 1031.

This law gave to the Probate Court authority to order the partition of lands held in common by the succession and the applicant for such partition; but the Court had no jurisdiction in cases for specific performance of contracts, or to hear and determine upon the validity of land, or other imperfect titles."

Petitioner further shows to the Court, that the decision of the Circuit Court of Appeals, in holding that the Probate Court of Houston County had jurisdiction to make the decree for specific performance, relied on and copied above, is contrary to, and in conflict with the principle of law, as decided by this court in the cases of

Galpin vs. Page, 18 Wall. 350;

Thatcher vs. Powell, 6 Wheat. 128;

that in proceedings had under special statutory authority, where the special powers conferred are exercised in a special or summary manner not according to the course of the common law, or where the general powers of the Court are exercised over a class not within its ordinary jurisdiction upon the performance of the prescribed conditions, no presumption of jurisdiction will attend the judgment of the Court; but that in all such cases, the facts essential to the exercise of the special jurisdiction must appear upon the face of the record. And in summary proceedings, where a court exercises an extraordinary power under a special statute which prescribes its course, that course must be strictly

pursued, and the facts which give jurisdiction must appear on the face of the record; otherwise the proceedings are not merely voidable, but absolutely void, as being *coram non judice.*

And in this respect the Supreme Court of Texas holds the same doctrine as announced in the cases of Bryan vs. Sundburg, 5 Texas 424;

Mills vs. Herndon, 60 Tex. 353;

Wise vs. O'Malley, 60 Tex. 588;

Mayo vs. Tudor's heirs, 74 Tex. 471;

Brown vs. Wheelock, 75 Tex. 385.

The record of the probate proceedings in said cause, fail to show upon its face that the contract sought to be enforced by the decree of the probate court was in writing, and the Supreme Court of Texas hold that the probate court has not such jurisdiction unless the contract is in writing, and that it would be for the interest of the estate that it should be enforced.

Peters vs. Phillips, 19 Tex. 70;

Houston vs. Killough, 80 Tex. 296;

Norris vs. Duncan. 21 Tex. 594

Indeed such is the exact language of the statute itself.

The power as given by the act of February 2nd, 1844, was not intended to be exercised according to the course of the common law, as the mode of proceedure prescribed in section three indicates; and the record of the probate proceedings show that in this particular case, the power was exercised in a very summary manner, the order being made on the same day that the petition was filed.

A careful reading of those proceedings will make it apparent that, not only does the record fail to show that the contract sought to be enforced was in writing, but that it shows affirmatively that if there ever was such a contract, it was a parol contract, and never in writing.

The decision of said Circuit Court of Appeals, is also at variance with that universal rule of law, that "nothing shall be intended to be within the jurisdiction of an inferior court, but that which is especially conferred;"

Hawes on Jurisdiction of Courts, Sec. 8.

"That where special powers are conferred on a court, either of general or limited jurisdiction, it is rigorously restricted to those granted, and the grant itself is strictly construed; the jurisdictional facts must appear on the face of the proceedings. The Court can take no additional power from its general jurisdiction. In the exercise of such special powers, it is precisely limited to those plainly delegated. Nothing is to be presumed which is not expressly given."

Sutherland on Statutory Construction, Sec. 391.

That the probate courts of Texas under the constitution of 1845 (Art. 4, Sec. 15), are "inferior tribunals," can admit of no doubt, as the legislature is only authorized to establish in each county such "inferior tribunals for appointing guardians, granting letters testamentary and of administration; for settling the accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates."

This power to decree specific performance of executory contracts to convey land, only where the contract or agreement is in writing, under section 53 of the general probate law of March 20, 1848, has always been characterized by the Supreme Court of Texas as a special and limited jurisdiction.

Jones vs. Taylor, 7 Tex. 240;
Booth vs. Todd, 8 Tex. 137;
Peters vs. Phillips, 19 Tex. 70;
Houston vs. Killough, 80 Tex. 296.

The decision of said Circuit Court of Appeals, in holding that any intendment is to be taken, or any presumption indulged, in favor of the jurisdiction of the Probate Court, or in favor of the validity of its proceedings, in the exercise of summary powers, or in proceedings *in rem*, such as is shown by the record in said cause, is at variance with the settled rule of decision in the United States' Courts.

Mathewson vs. Sprague, 1 Curtis (C. C. R.) 457;
Harris vs. Hardeman, 14 How. 334.

The same doctrine is applied to the jurisdiction of the Federal Courts, and no presumption is indulged in its favor, as it is confined to what is expressly given by the constitution and statutes; and the facts upon which the jurisdiction rests must always appear upon the record.

Godfrey vs. Terry, 97 U. S. 171.

Said decision of the Circuit Court of Appeals, in holding that the pretended claim of Crawford Grigsby's estate, based on the contract which was sought to be enforced in the Probate Court against the estate of John Grigsby, was a valid and existing

legal claim against said estate, is directly in conflict with the decision of the Supreme Court of Texas, in the case of McDougald vs. Hadley, 1 Tex. 490, wherein it is held that under the 16th section of the general probate law of Feb. 5th, 1840, where a demand against an estate was not presented to the administrator within the time prescribed, and suit was not commenced thereon for more than twelve months after letters of administration had been granted, was barred and extinguished. The provision of the statute referred to, required all demands against an estate to be presented to the executor or administrator within twelve months from the date of the letters testamentary or administration, and if not done, that they should be barred.

Hart. Dig. Art. 1010.

This doctrine was afterwards affirmed in
Graham vs. Vining, 1 Tex. 669;
Graham vs. Vining, 2 Tex. 440;
Millican vs. Millican, 15 Tex. 463.

In the first cited case, the Court say: "It would appear that the same policy by which we are called on to give a liberal construction to other statutes of limitation, would as strongly demand the same rule to be applied to this, if not more so. It is much easier to bolster up fictitious and fraudulent demands against an estate than against the living. The dead can give no reference to evidence to disprove those fraudulent demands; hence the necessity of subjecting claimants, not only to strict proof, but restricting them to a short time for presenting them."

1 Tex. R. p. 493.

This statute continued to be the law until the adoption of the general probate law of May 11th, 1846, which for the first time provided that all claims that were not presented to the administrator for allowance within twelve months after the grant of letters of administration, should be postponed until those that had been so presented were paid. The act of 1840 was in force when John Grigsby died, in the early part of the year 1841, as shown by the probate record, and when Crawford Grigsby was appointed administrator of his estate. The latter continued to be such administrator for two years before his death; at which time the pretended claim in his favor was barred and extinguished. It was never heard of until March 29th, 1847, when it was for the first time presented and rushed through hurriedly by parties who were more largely interested in Crawford Grigsby's estate than they were in John Grigsby's, and the language of the Court above quoted in the case of McDougald vs. Hadley, concerning fictitious and fraudulent claims against estates, becomes peculiarly applicable to the facts and circumstances in this case.

This provision of the probate law of 1840, requiring claims against estates to be presented to the executor or administrator for allowance within twelve months, was not an ordinary statute of limitations. The time within which the claim must have been presented, operated as a limitation, not of the remedy alone, but of the claim itself, and extinguished it.

Steamer Harrisburg vs. Rickards, 119 U. S. 199.

Pulliam vs. Pulliam, 10 Fed. R. 76;
Cooper vs. Lyons, 9 Lea (Tenn.) 596;
Kendall vs. U. S., 14 Court Claims R. 122;
Cochran vs. Young, 104 Pa. St. 333;
Littlefield vs. Eaton, 74 Maine 516.

More especially is this so in the case now under consideration, because it was a claim for land, an inchoate, equitable title to land, and not an ordinary claim for money.

Campbell vs. Holt, 115 U. S. 620.

In the opinion of the trial judge, as well as of the Circuit Court of Appeals, considerable stress is laid upon the fact, that upwards of forty years has elapsed since the proceeding in the Probate Court took place, before any complaint was made; and this seems to have largely influenced the decision of both Courts. In

Paul vs. Willis, 69 Tex, 261,

Thirty-five years had elapsed after the probate proceeding before suit was brought for the land, and in

Houston vs. Killough, 80 Tex. 296,

Fifty-seven years had passed before the question was raised, and in both cases, the court held that lapse of time could have no influence whatever, in determining the validity or invalidity of the decree of the Probate Courts. In the former case it is said: "A void judgment is always subject to collateral attack, and it can derive no legal sanction from lapse of time.

Freeman on Judgments, Sec. 117.

Petitioner respectfully shows to the Court, that he earnestly believes that he has a meritorious case;

that his mother, when a helpless infant, was defrauded of her just inheritance. There are many facts and circumstances appearing in the probate record itself, which strongly support this assertion; but when it is remembered that shortly after this suit was brought in the Circuit Court, the defendants themselves, took the depositions of two aged witnesses, to perpetuate their testimony, with the view of proving that there was a contract between John Grigsby and his son Crawford, for the location of the headright certificate of the former, and that the latter did locate and survey the land; and that these witnesses proved beyond the shadow of a doubt, that no such contract ever existed between John and Crawford Grigsby for the location of the certificate; that Crawford did not locate and survey the land, but that John Grigsby himself paid one of the witnesses for it, the question of the moral right and justness of petitioner's claim is forever put at rest. These depositions are now on file in the Courts under whose authority they were taken to perpetuate the testimony of the witnesses, and petitioner prays that he may be permitted to file herewith, certified copies of the same in support of this application, according to the ancient custom and practice in applications for the writ of certiorari.

The premises considered, petitioner says that great injustice has been done him in the judgment and decision of said Circuit Court of Appeals.

Wherefore, in view of the grave and important questions presented in the record of said cause, grave

and important not only on account of the nicety, intricacy and universality of the legal propositions which have been violated, misapplied or ignored by said Circuit Court of Appeals, but equally so on account of the magnitude of the interests involved; for the sake of uniformity in the decisions of the Circuit Courts and Circuit Courts of Appeals with the decisions of this Court; for the maintenance of that harmony and correspondence between the decisions of the Federal Courts and those of the highest State Courts, relative to the construction and interpretation of state statutes and the jurisdiction of state courts, which is so essential to the symmetry of the whole as a system of jurisprudence; but more than any of these, aye, more than all of these, for the sake of justice, that right may prevail over wrong; not only that justice may be rendered, but that a long course of injustice may be redeemed; that your petitioner may receive that measure of sure and speedy justice to which the humblest is entitled, he invokes the power of this court, and prays that the writ of certiorari, or such other process as the Court may consider necessary, be issued to said United States Circuit Court of Appeals for the Fifth Circuit, requiring the record, judgment and all proceedings in said cause to be certified to this court for its review and determination; that the judgments of said Circuit Court and of said Circuit Court of Appeals be reversed, and that said cause be remanded to said Circuit Court, to be further proceeded in, in accordance with the judgment and

opinion of this court, and as in duty bound your petitioner will ever pray, etc.

A. H. GARLAND,

Attorney for Petitioner.

June 15th, 1893.

FILED.
OCT 10 1893
JAMES H. McKENNEY,
CLERK.

No. 953

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1893.

In the matter of the Application of Robert F. Aspley, for a Writ of Certiorari to the Circuit Court of Appeals of the Fifth Circuit, at New Orleans, La., in cause:

ROBERT F. ASPLEY, PLAINTIFF IN ERROR,

vs.

J. P. MURPHY, ET AL. DEFENDANTS IN ERROR.

Brief and Argument Resisting the Application for said Writ of Certiorari.

DALLAS, TEXAS:
White & Yeargan, Printers and Blank Book Manufacturers.
1893.

IN THE

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vs.

J. P. MURPHY, ET AL., DEFENDANTS IN ERROR.

BRIEF AND ARGUMENT RESISTING THE APPLICATION FOR SAID WRIT OF CERTIORARI.

This action having resulted in a judgmenr in favor of defendants in the Circuit Court for the Northern District of Texas, at Dallas, applicant, being plaintiff below, prosecuted a writ of error to the Circuit Court of Appeals of the Fifth Circuit, at New Orleans, La., wherein the judgment of the court below was on the 24th day of June, 1892, affirmed; whereupon he filed his petition for a re hearing, which, on December 12th, 1892, was overruled Thereafter applicant applied

to the Circuit Court of Appeals for a certificate, of the questions of law involved in said cause, to this court, which request, was on the 12th day of December 1892, refused by an order of said Circuit Court of Appeals (see applicant's petition herein, page 7) which order is in words as follows:

"Considering that the questions involved in the cause relate to the title to land, and are purely local, and that the conclusions reached by the Circuit Court of the Northern District of Texas has been fully concurred in by the three judges constituting this court, and the decree rendered by said Circuit Court has been in its entirety affirmed by this court: it is ordered that said application be refused." [See record, pages 62-63]

Thereafter on the 23d day of May, 1893, applicant presented his petition, to said Circuit Court of Appeals praying for a writ of error to remove said cause to this court, which application was also refused. (See applicant's petition, p. 7.) Applicant now applies to this court for a writ of certiorari to be issued to said United States Circuit Court of Appeals for the Fifth District, requiring the records, etc., to be certified to this court for its review and determination, and as grounds therefor presents his petition herein, alleging the following reasons, and no other, for the relief prayed for, to-wit:

First that the property involved is worth one million dollars, and is only part of a claim estimated at about six million dollars.

Second, that the questions involved in said cause are of great gravity and importance (a) on account of the magnitude

of the interest involved, and (b) on account of the principles of law relating to the jurisdiction of courts and the interpretation and construction of statutes alleged to be involved in said cause.

Third, that the decision of said Circuit Court of Appeals is not uniform with the decisions of this court, and,

Fourth, that the decision of said Circuit Court of Appeals is not in harmony with the decisions of the Supreme Court of Texas on the questions involved.

The grounds assigned by petitioner in his first assignment and also in sub-division "(a)" of his second assignment involve the same idea, to-wit: that the large alleged value of the property in question raises a question of "great gravity and importance." To this we confidently submit that the question of *gravity* and *importance*, within the meaning and spirit of the adjudications of this court, in ex parte Lau Ow Bew, 141 U. S., p 583, and in Fabre, Petitioner, No. 1237 decided at the October term, 1892, of this court, construing the purpose and object of Section 6 of the act of congress of March 3d, 1891, does not in any measure depend upon the mere question of the *amount* involved. As we understand those decisions the "gravity and importance" there referred to must apply to the *question* involved and not to the *amount in controversy*.

As to the ground assigned in sub-divssion "(b)" of petitioner's second assignment above, to the effect that "on account of the principles of law relating to the jurisdiction of courts and the interpretation and construction of statutes" the

questions involved in this suit are, therefore, of "great gravity and importance," we submit that upon the face of applicant's petition herein, as well as by the express adjudication of the Circuit Court of Appeals "the questions involved relate to the title to land and are purely local," and that it is to the gravity and importance of *questions* involved that this court will look, in determining to exercise, or not, this branch of its jurisdiction, which in the case of Lau Ow Brew, supra, it has already announced would be used "sparingly and with great caution" And in this case, especially will this court, in the present application, consider the fact that the principles of law referred to by petitioner not only relate to a mere private and local controversy, but to the jurisdiction of a court established and regulated by the Acts of February 5th, 1840, February 2d, 1844, and May 1th, 1846 (Hartley's Digest, pp. 324, 344 and 347,) and to the interpretations and constructions of sections of *those acts only;* which said acts were totally repealed and the courts established thereunder abolished, and an entire and new probate system organized, in 1848, by the act of March 20th, 1848, (Hartley's Digest, p. 355,) entitled: "An act to regulate proceedings in the County Court pertaining to estates of deceased persons" By Section 137 of said act (Hartley's Digest, Art. 1246.) it is provided in words as follows, viz: "This act shall take effect and be in force from and after the 1st Monday in August, 1848; and on and after that day 'An act to organize probate courts,' passed 11th May, 1846, shall be and is hereby repealed."

This court will also consider that at the dates mentioned Texas was a very sparsely settled State, and, in the very nature of things the questions of controversies of a similar kind,

as those involved in this case, depending upon the interpretation and construction of said obsolete early acts and the jurisdiction of said ancient courts all power of which terminated on the first Monday of August, 1848, must necessarily be few and of the veriest local character.

Wherefore we further submit that, under the adjudications of this court, denying applications of this character in the matter of John Woods and Stephen B. Lovejoy, 143 U. S., p. 202, in which the following language is used:

"The power of this court to require a case, in which the judgment and decree of the Circuit Court is made final, to be certified for review and determination, under the act approved March 3d, 1891, should only be properly invoked when questions of gravity and importance are involved; this must necessarily be so in any view, and especially when it is considered that the Circuit Court of Appeals was created for the purpose of relieving this court of the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern and delayed suitors in the pursuit of justice * * * * * But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them;" as well as under the adjudications in the other cases

hereinafter referred to, the case presented in petitioner's application, does not fall within the class over which this court will exercise the extraordinary jurisdiction prayed for. In fact we believe, from the several adjudications of this court upon this question, the rule has already been well defined by which this court will be governed in such applications as this; and such rule we deduce from the authorities to be as follows: That in questions of *public* importance affecting the relations between the United States and a foreign country, or affecting a large class of people, whether resident citizens or aliens, and to a certain extent involving a national or international matter, this court will exercise the jurisdiction conferred by Section 6 of the act of March 3d, 1891, (Lau Ow Bew, supra, the case of Fabre, petitioner, supra,) but when the question involved is merely of private controversy, involving mere local property rights and principles of law of only local application, this court will refuse to exercise such jurisdiction (case of Woods & Lovejoy, supra; also American Construction Company vs. Jacksonville Railway, 148 U. S., p. 372); in the latter case especially this court has said in reference to section 6 of the act of March, 1891:

"The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals and making the judgments of that court final except in extraordinary cases. * * * Accordingly, while there have been many applications to this court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted, * * * the one involving a grave

question of public international law affecting the relations between the United States and a foreign country, the other an admiralty case which presented an important question as to the rules of navigation."

The assignments relied upon by petitioner in his third and fourth assignments of grounds why his application should be granted, are to the effect, that there exists alleged want of uniformity between the decision of the Circuit Court of Appeals and certain decisions of this court; and an alleged want of harmony between said decision and certain decisions of the Supreme Court of Texas.

In response to said assignments we respectfully submit, that under the adjudications above referred to, such want of uniformity and harmony, if they exist, do not bring this case within the class over which this court will exercise jurisdiction. Such assignments, we apprehend, constitute no more than an attempt to prevail upon this court to review the decision of the Circuit Court upon pure abstract questions of local law relating to a private controversy. We believe that this court will not entertain the application on the grounds assigned. We think, as we understand the decisions, it has been expressly adjudicated in case of ex parte Woods, supra, the American Construction Company vs. Jacksonville Railway, 148 U. S., p. 372, that the primary purpose of the act of March, 1891, was to relieve this court of jurisdiction except in cases involving questions of great gravity and general im-

portance and that in all other cases in which the decisions of said Circuit Court of Appeals are made final by section 6 it was the intention of congress that unless it became necessary to preserve harmony in the decisions of the Circuit Courts of Appeals of different circuits, every such final decision of the Circuit Court of Appeals should be in fact final and conclusive of the controversy.

If the door of approach is to be opened upon such grounds as are involved in the said third and fourth assignments of petitioner, we submit that the relief sought to be afforded by the act of March 3d, 1891, will scarcely be accomplished as there are few cases, involving any serious contest, in which some conflict of decisions between courts cannot be made to appear. But we understand, upon the plainest rules of construction that the only case of conflict of decisions which will, in any case, alone confer jurisdiction upon this court under section 6 of the act of 1891, are such conflicts as exist between the decisions of the Circuit Courts of Appeal of different circuits.

In speaking of this subject, this court, in the case of ex parte Woods, supra, referring to this very question, says:

"But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section 6 for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusions in controversies involving weighty and serious matters."

And again in the case of the Columbus Watch Company vs. Robins, 148 U. S., p. 266, the following language is used:

"It is also provided in respect to cases in which the judgments and decrees are made final that it shall be competent for the Supreme Court to require a certiorari, etc. * * * Thus in the interest of jurisprudence and uniformity of decision, the supervision in this court, by way of advice or direct revision, is secured."

From which we think it is manifest that, from the provisions of the act of 1891, interpreted in the decisions aforesaid, it is settled law that only in case of conflict between the decision of a Circuit Court of Appeals of one circuit and another decision of a Circuit Court of Appeals of another circuit, will this court take jurisdiction by writ of certiorari, when conflict of decision is relied upon in an application for the writ, and then only for the sake of harmony and system in the *Federal jurisprudence*. The assignments aforesaid nowhere bring the case of petitioner witnin the class contemplated by said act of 1891 and the decisions construing it, and certainly do not present a case requiring interposition of this court for the sake of system and harmony in Federal jurisprudence.

Indeed, so confident are we that this court will decline to examine the cases cited by petitioner in his brief and petition in support of his third and fourth assignments, that we have concluded not to incumber this brief and argument with any further reference to such assignments. But, in the event that

we should however be mistaken as to the action with reference thereto to be taken by this court, we have included our consideration of such third and fourth assignments in a separate and supplemental brief, which we respectfully submit to the court, in connection herewith, should it determine to enter upon an examination of the cases cited by petitioner.

For the reasons above set forth, defendants humby pray that the application of petitioner, be refused, as in duty bound they will ever pray, etc.

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October 1st, 1893.

II.

APPELLEES'

Supplemental Brief and Argument

RESISTING THE

Applicatien for Writ of Certiorari.

Examination of Cases Cited in the Application and Brief of Applicant.

But if this court should be of the opinion that it will investigate the cases cited by petitioner in his brief and argument, to ascertain whether there is that want of uniformity and that lack of harmony complained of by him, in his third and fourth assignments, we respectfully submit an examination of the cases should be made, First, with reference to the exact points of decision involved in the decision of the Circuit Court of Appeals for the Fifth Circuit, and Secondly, that they should be examined in the order assigned by petitioner, viz: First, the decisions of this court with reference to the alleged want of uniformity between them and the decisions of the Circuit Court of Appeals, and finally, the decisions of the Supreme Court of the State of Texas with reference to the alleged want of harmony between them and said decision of the Circuit Court of Appeals. Therefore, entering upon the consideration of the questions above in the manner indicated, we submit that the decision of the Circuit Court of Appeals, to be found on pages 63 to 68 of the record in this case, involves but two points, viz: Had section 2 of the act of 1844, (Hartley's Digest, page 344, article 1070,) which confessedly conferred all power upon the probate court to make such orders as the orders in question in this case, been repealed by section 27 of the act of May 11th, 1846? (Hartley's Digest, article 1108,) and, second, if so repealed, did the act of 1846, by sections 13, 14, 15 and 16 thereof, (Hartley's Digest, articles 1095, 1096, 1097 and 1098,) confer the power in question? (See opinion of Judge Billings, record, pp. 64-65.)

The first decisions of this court cited or referred to by

petitioner, (pages 10, 11 and 12 of his petition,) bear upon the proposition in said decision of the Circuit Court of Appeals by which it decides that the act of 1844 was unrepealed by that of 1846, for the reason that the repealing clause of the latter act was intended by the legislature to include only *general laws* upon the subject of settlement of succession and not to include those provisions of statutes (such as the second section of the act of 1844) which, though they affect the settlement of successions, nevertheless, from their evident object would more properly be designated or classed as special statutes under some other head. The point and the only point involved then, in such decision, is the question of harmony, or want of harmony, between the decision of the Circuit Court of Appeals holding that the repealing clause of a general statute repealing all acts or parts of acts in conflict with provisions of that statute, does not also repeal other statutes having for their object a distinct purpose and more properly designated and classed as statutes under some other head than the statute containing the repealing clause, though they bear some relation to the subjects included in the general statutes. The decision of the Circuit Court of Appeals or such parts thereof as is necessary for the examination of the cases cited by applicant is in words as follows:

"But one ground was insisted on in the argument, and that presents the question, 'In the year 1847 had the probate court of the State of Texas, the power to authorize an administrator to make a deed in satisfaction or payment of a claim for land due by his estate where the administrator accepted the claim and the court upon evidence taken approved it.' The record shows that the facts in the case bearing upon this

question were as follows: John Grigsby died in March, 1841; in February, 1847, the administrators of his estate, the administration of which was pending in the probate court of Houston county, upon a petition which represented that Crawford Grigsby had in the lifetime of the decedent a contract with him whereby he was entitled to a conveyance of 1000 acres out of a tract in said petition described; that said Crawford Grigsby was also deceased and his estate was represented by an executor, who represented the heirs; after a hearing and upon proof being offered, obtained the following order: 'That he be, and is hereby, authorized and required to make a deed to the heirs of Crawford Grigsby, deceased, for 1000 acres of land, agreeable to the contract as proven'

"In pursuance of this order the deed was made.

"The question is, had the probate court the authority to make the order? The statute of 1844, entitled 'an act to define and fix the practice of probate courts in certain cases,' in section 2, (1 Sayles' Early Laws of Texas, article 1341,) provided as follows:

"Sec. 2. that whenever there may be outstanding bonds, obligations or contracts in writing for the conveyance of land or tenements against the estate of any deceased person, which it may be to the interest of said estate shall be lifted or complied with it shall be the duty of the probate court, where the succession is open, or where there was or may be administered upon application by petition of the executor or executrix, administrator or administratrix, or guardian, where all the heirs are minors and have such guardians, after full proof of the existence of such bonds, obligation or contract, in writing, and

upon satisfactory evidence, that a compliance with the requirements of said bond, obligation, or contract, would be beneficial to the interest of said estate, to decree that the person thus applying shall fully comply with the same, and any deed, or tender of deed, made under such decree, shall be as valid and binding as if it had been made or tendered by the testator or intestate himself.

"No question is made but that this section of the statute above quoted gave the probate court the power to authorize the deed in question

"The matters to be considered are, first, had this section been repealed? and, second, what other statutes, if any, was there in force which authorized it?

"1st. as to the repeal:

"After the admission of Texas into the union as a state, a constitution, in 1845, was adopted which distributed the probate jurisdiction between the district court and the inferior or probate court. The sections which bear upon this matter are (Const. of 1845) art. 4, secs. 1 and 15; charters and constitutions, part 2, Texas, pp. 1722 and 1773.

"Section 1. The judicial power of this state shall be vested in one supreme court, the district courts, and in such inferior courts as the legislature may from time to time ordain and establish, and such jurisdiction may be vested in corporation courts as may be deemed necessary, and be directed by law.

"Section 15. Inferior tribunals shall be established in each county for appointing guartians, granting letters testamentary and of administration, for settling the accounts of

executors, administrators, and guardians, and for the transaction of business appertaining to estates; and the district courts shall have original and appellate jurisdiction and general control over the said inferior tribunals, and original jurisdiction and control over executors, administrators, guardians and minors, under such regulations as may be prescribed by law.

"In artical 13, section 3, it was provided as follows:

"*Charters and Constitutions, part* 2, *p.* 1781."

"Sec. 3. All laws or parts of laws now in force in the Republic of Texas, which are not repugnant to the constitution of the United States, the joint resolutions for annexing Texas to the United States or to the provisions of this constitution shall continue and remain in force as the laws of this State until they expire by their own limitation, or shall be altered or repealed by the legislature thereof.

"It is thus evident that by force of sec. 3 of art. 13, all the probate laws were continued in force until they should be repealed by the legislature.

"The plaintiff in error contends that sec. 2 of the act of 1844, was repealed by the act of May 11th, 1846. This last act is entitled: 'An act to organize probate courts.' (2 Sayles' Early Laws of Texas, art. 1739.) The repealing clause is found in the last section of the act, sec. 27, and is as follows:

"Sec. 27. That all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of successions be and the same are hereby, repealed, and

the unfinished business of all estates now pending shall be conducted from this day in accordance with the provisions of this act; and this act shall take effect from the second Monday of July next. (Post, art. 2204.)

"In the written opinion of the trial judge he reaches the conclusion that the act of 1844 was unrepealed by that of 1846, upon the ground that the decisions of the Supreme Court of Texas give countenance to the doctrine that this repealing clause was intended by the legislature to include only general laws upon the subject of settlement of successions, and not to include those provisions of statutes which, though they affected the settlement of succession, nevertheless from their evident object, would more properly be designated and classed as statutes under some other head. He refers to Booth vs Todd, 8 Texas, 137, and to Duncan vs. Veal, 49 Texas, 613, and to The Land and Cattle Company vs. Boon, 73 Texas, 554.

"Two things, we think should be suggested in this connection as also tending to establish the conclusion reached by the court below upon the question of legislative intent upon the matter of repeal:

"First, the question presented to the court in this case is one as to power or authority which has been conferred by a previous statute and strictly not as to the duties of the probate courts; and, secondly, the inquiry whether courts ought not rather to infer that the legislature intended to sweep away all laws on this subject of the settlement of estates, leaving as a statute law on this difficult and important subject only that brief statute containing the language of repeal, consisting

of only 27 sections, to infer that the legislature intend to repeal only the act of Feb. 5th, 1840, which had for its title the very words used in the repealing clause, being entitled: 'An act to regulate the duties of probate courts and the settlement of succession,' 41 Sayles' Early Laws of Texas, art. 736, and being an act largely relating to forms of procedure in the probate courts, especially since the question presented to us is with reference to the action of a probate court which has been acquiesced in for upwards of forty years."

The decisions of this court cited in petitioner's brief may be divided into classes as follows:

1st. Those in reference to the implied repeal of one statute, by a later statute.

2nd. Those in reference to the construction of probate statutes, with reference to the power to decree the sale of the lands of a decedent.

3rd. Those in reference to the doctrine of presumptions to be indulged on collateral attack, in support of the findings of a court.

4th. Those in reference to the effect of statutes of limitations upon claims against the estate of a decedent.

From the above decision it will be observed that the only point decided by the Circuit Court of Appeals to which any of the cases first cited by petitioner have any application, is that the repealing clause in a general statute does not repeal a special statute, and the decision refers to, and is clearly borne out by the Texas cases therein cited. In this connection we desire to call the attention of the court to a more particular

explanation of the exact point so decided by said Circuit Court of Appeals. By the act of February 5th, 1840, (Hartley's Digest, art. 1995, et seq., entitled "An act regulating the duties of probate courts and the settlement of successions,) the ordinary jurisdiction of a probate court is therein conferred upon the probate courts; which did not include the power, however, to decree specific performance of an executory contract made by a decedent; that by section 2 of the act of February 2nd, 1844, entitled "An act to define and fix the practice of probate courts in certain cases," (Hartley's Digest, 1069, et seq.,) the power to decree the specific performance of such executory contracts, upon the application of an executor, administrator or guardian, in certain cases, is, for the first time, conferred upon the probate courts of Texas. (Houston vs. Killough, 80 Texas, p. 296.) That by the act of May 11th, 1846, entitled "An act to organize probate courts," the repealing clause, so confidently relied upon by petitioner, provides that "all laws or parts of laws heretofore in force relative to the *duties* of probate courts and the *settlement of successions*, be and the same are hereby repealed, and the unfinished business of all estates now pending shall be conducted from this date in accordance with the provisions of this act." (Hartley's Digest, art. 1108.) Now, we submit that the power to decree specific performance of executory contracts for the conveyance of land never was part of the ordinary powers of a probate court, but constituted a new and independent power, and never existed unless specially conferred by statute, which power emanating from the legislature, could be conferred upon any tribunal, and even upon officers, but, for the sake of convenience, is ordinarily conferred upon probate courts.

Authorities:

Messner vs. Giddings, 65 Texas, 308.
Withers vs. Patterson, 27 Texas, 496.

In Duncan vs. Veal, 49 Texas, p. 603, construing a special act of the legislature of 1841, conferring special power upon the probate courts in certain cases to administer upon the estates of soldiers, who had fallen in the battles of the Republic, enacted for the specific purpose of protecting the estates of volunteer soldiers from foreign countries, who had fallen in battle, or otherwise died in the Republic, it was held that such act was not repealed by the repealing clause of the general act of 1846 aforesaid, organizing probate courts, upon the ground of well established canons for the construction of special and general laws and their proper relation to each other.

In Kerens vs Alcorn, 9 Texas, pp. 33-34, and Houston vs Killough, 80 Texas, p. 296, it has been decided by the Supreme Court of Texas that the words "duties of probate courts and settlement of successions" do not necessarily include the subject matter such as the enforcement of executory contracts for the sale of land. In the case of the Bank of Hamilton vs. Dudley, 2 Peters, 492, it was decided by this court that "jurisdiction of all probate and testementary matters, granting administration, etc.," conferred upon the court of common pleas of Ohio, by its constitution then in force, did not necessarily confer the power upon said court to sell the lands of a decedent for the payment of the debts of an estate, and that a statute revoking such power theretofore granted was not unconstitutional.

The citation of the authorities above, and the quotation of the portions of the decision of the Circuit Court of Appeals above referred to, are made for the purpose of clearly presenting the exact point decided by said Circuit Court of Appeals in reference to the effect of a repealing clause of a subsequent statute upon prior statutes.

And in reference to the decisions of this court and the Supreme Court of Texas bearing upon the question of repeal of statutes by implication, cited by petitioner, we submit that none of them have any application to the exact point decided by the said Circuit Court of Appeals, to-wit: that the repealing clause in a *general* statute repealing all laws upon the same subject, does not include those provisions of *special* statutes, which, though they affect the same general subject, nevertheless, from their evident object and purpose, are very properly to be designated and classed as special statutes under some other head, and refer to a special and distinct subject matter. (See record, p. 65.) But, on the contrary, it will be seen that such decisions as cited by petitioner merely refer to the implied repeal of prior statutes by subsequent statutes in cases where the statute impliedly repealed is inconsistent and in conflict with the provisions of the subsequent statutes, either because its provisions directly conflict with the provisions of the subsequent statutes, or because it is manifest from the provisions of the subsequent statute that it was intended thereby to substitute, a complete system upon the subject matter included in the statute held to be impliedly repealed.

1. Upon examination of the decisions of this court cited by petitioner, it will be found that the first case cited by him

is that of the New Jersey Steamboat Company vs. Alfred Pleasanton, 18 Wallace, p. 478, (See page 10 of petitioner's brief,) but, in our opinion, petitioner does not correctly state the point decided by this court, in that case, a reference to which will show that it was there held that, by the 9th section of the act of 1866, declaring that the 103rd section of the act of 1864 should be amended, so as to read as therein provided, impliedly repealed the 4th section of the act of 1865, which declared that "the receipts of vessels paying tonnage duty should not be subject to the tax (of 2½ per cent,) of the gross receipts from passengers, provided in section 103 of the act of 1864, nor by any act amendatory thereof." And the court very properly states that the 103rd section of the act of 1864 was superseded and annulled by the 9th section of the act of 1866, and therefore the proviso in the 4th section of the act of 1865 fell with it, the latter referring to the former. That when the former ceased to exist, there was nothing left for the latter to operate upon. This case, we hold, has no application to the point decided by the Circuit Court of Appeals.

2. The next decision of this court, cited by petitioner, is that of Stewart vs. Kahn, 11 Wallace, 493, (see p. 11 of petitioner's brief,) in which it is held by this court that the second section of the act of congress of February 5th, 1867, amending the judiciary act of 1789, being intended as a substitute for the judiciary act of 1789, was an implied repeal of such portions thereof as were omitted in section 2 of the act of February 5th, 1867, which was, except as to the omitted part, substantially in the language of the act of 1789. And, to the same effect (as far as applicable to this case) is the case of

Murdock vs. Memphis, 20 Wallace, p. 590, referred to by petitioner on page 11 of his brief, and the case of United States vs. Tynen, 11 Wallace, p. 88, cited by petitioner on page 12 of his brief, of which cases no further notice will be taken, further than to state that in the decision of this court in the case of Murdock vs. Memphis, supra, it is expressly said by the court that it was the intention of congress, by the second section of the act of 1867, to make a new law so far as the 25th section of the act of 1789 differed from the former, and it, of course, repealed all other law on the subject embraced within the second section of the act of 1867; and we submit that these cases are therefore not applicable to the point decided by the Circuit Court of Appeals in this case.

3. Petitioner cites further the case of Davies vs. Fairbairn, 3 Howard, p. 636, (see page 12 of his brief,) in which this court decided that the Virginia act of 1776 adopted by Kentucky, on the suject of conveyances of separate property by a feme covert residing out of the State of Kentucky, was not repealed by the Kentucky Act of 1785, and a subsequent act of 1796, for the purpose of regulating conveyances; for the reason that neither of the acts contained any provision repugnant to the act of 1776, or expressly repealing said act. On page 646 of said 3rd Howard, the court says, as to the act of 1785: "There is no express repeal, no repugnance as regards the power of the mayor of a city to take the acknowledgment of a feme covert. * * * * We are thereby brought to to the conclusion, looking only at these statutes, that the latter act in this regard may be considered as cumulative;" and on page 649, the court says, with reference to the act of 1796: "None of these acts repeal in terms the above provision, in

the act of 1776, and they contain no repugnant provision; consequently the first act stands unrepealed." We therefore submit that this case has no application to the point decided by the Circuit Court of Appeals.

4. The decisions other than those above mentioned and referred to by petitioner in his brief, although they may bear upon some points involved in this controversy, have no bearing upon any particular point involved in the written opinion and decision of the Circuit Court of Appeals except, perhaps, the case of the Bank of Hamilton vs. Dudley, 2 Peters, 492, (p. 13 of petitioner's brief,) in which last named case, it is simply announced by this court, that the grant to the court of common pleas, in Ohio, by the constitution of that state then in force, of jurisdiction of all probate and testementary matters, did not necessarily include the power to sell realty of a decedent for the purpose of paying debts, and that a subsequent act revoking such power, theretofore granted, by a prior act, was not unconstitutional — which case has no application to the assignments of petitioner. We submit however, that the rule there announced is sound, and that we have invoked the same for the purpose of showing that the act of 1844 contained a grant of power new and independent of the acts of 1840 and 1846, and that, therefore, the repealing clause of the latter did not embrace the act of 1844. The other decisions of this court, cited by petitioner, are of two classes: First, those referring to the doctrines of presumptions to be indulged on collateral attack in support of the jurisdiction of courts; and, Secondly, those referring to certain doctrines of limitations, neither of which points are referred to by the Circuit Court of Appeals, in its decision.

5. In reference to the cases of Galpin vs. Page, 18 Wallace, p. 350, and Thatcher vs. Powell, 6 Wheaton, 128, referred to by petitioner on page 14 of his brief, to the effect that where courts, whether of limited or general jurisdiction exercise a power conferred by virtue of special statutes and proceed contrary to the course of common law, amd in a summary manner; or act over a class not within their ordinary jurisdiction, no presumption of jurisdiction will attend the judgment of such courts in cases of a silent record; but in all such cases, the facts essential to the exercise of the special jurisdiction must appear upon the face of the record; we have to say that the doctrine there announced is, in our opinion, a well recognized law of the State of Texas, but has no bearing upon any point involved in this case; a complete answer to the same being that it has been decided in Texas ever since the case of Alexander vs. Maverick, 18 Texas, 179, that the probate courts of Texas, in matters within their jurisdiction, have always been held to be courts of general jurisdiction, and their proceedings on collateral attack have always been entitled to every presumption in support of its rightful exercises, which doctrine has never been overruled in Texas, but is the law to this day. But even if it be held that in acting upon the executory contract for the conveyance of land, executed by John Grigsby, the probate court, in 1847, acted under the act of 1844, conferring upon it special statutory powers, in which it proceeded contrary to the course of common law, yet, as shown by the record in this case, all the conditions for the exercise of such power affirmatively appear upon the record to have existed. The order of court contains the following language, to-wit: "Whereas, proof having been

made in writing, to the satisfaction of the court, that John Grigsby, during his life-time, in about the year 1840 or 1841, made and entered into a contract with Crawford Grigsby to locate and survey one league aud labor of land," etc., (see pp. 23 and 24 of the record,) and it appears by the record that such order was made after an application by the administrator of the estate of John Grigsby, supported by affidavit of William Grigsby, (see pp. 22 and 23 of transcript,) all of which said conditions fully complied with the requirements of article 1070 of Hartley's Digest; and the contention upon the part of petitioner that it does not affirmatively appear that the contract between John Grigsby and Crawford Grigsby was in writing is sufficiently met by the language of the order, in favor of which and the rightful exercise of the court's jurisdiction, reasonable intendments will be indulged; and such recitals in connection with the presumptions of *proper* proof having been given to the *satisfaction* of the court as to the existence of said contract, clearly establish affirmatively that the contract was in writing. (Grignon's Lessee vs. Astor, 2 Howard, 319.) In this connection we wish to call attention to the language of the decision of the Circuit Court of Appeals upon this particular question in this case:

"The forms pursued by the administrator and the heirs of Crawford Grigsby, complied with the forms of the act of 1844; that is, the petition was filed by the administrator and was verified by proof of witnesses taken before the court, but the substance of the procedure was precisely that authorized by the act of 1846. It comprised the presentation of a claim for land not only verified, but established by testimony, both, as to the contract and its not having been performed by the

obligor; that it was accepted by the administrator and approved by the judge, and it ended in a decree, from which any party having an interest might have appeal to the District court."

But, before leaving this point, we desire to call attention of the court to the fact that the decision of the Circuit Court of appeals does not locate the power of the probate court in 1847, to make the order complained of in this case, *solely* under the provisions of the act of 1844; but it is clearly shown by said decision that the power expressly, and by necessary inference, was granted and existed by sections 13, 14, 15 and 16 of the act of May 11th, 1846, (Hartley's Digest, articles 1095 to 1098.) and that upon the face of the proceeding in this case, (see record, pp. 22, 23 and 24,) it affirmatively appears that all the conditions for the exercise of such power conferred by said sections were complied with. On this point the court below says:

"We have thought it our duty to consider also the question of power or authority in the probate court to make the order in dispute, even under the statute of 1846 alone, and we are of opinion that this statute in itself gives adequate power.

"Sections 13, 14, 15 and 16, 2 Sayles' Early laws of Texas, art. 1739, are as follows:

"Sec 13. That every claim for money, or personal property, or for land, before it can be acknowledged, must be verified by the affidavit of the owner before the judge of probate or a notary public, stating what part is due and unpaid and not satisfied, and when thus verified and presented; the ex-

ecutor or administrator shall endorse thereon his acceptance or rejection with the date of presentation.

"Sec. 14. That all claims accepted by executors or administrators shall be presented to the judge, who shall endorse on the same his approval or non-approval.

"Sec. 15. That no action shall lie on a claim before its presentation for acknowledgment, but if a claim be rejected by the executor or administrator, or if accepted by him and disapproved by the judge, the owner of such claim may, for the establishment thereof, institute suit against such executor or administrator, before a justice of the peace or the district court of the county where the succession is opened; but no judgment thereon shall give such claim priority, but it shall be paid currently with other claims of the same degree.

"Sec. 16. That any party interested in his own right, or as representative in right of another, may by giving security for the costs and damages, appeal to the district court from any judgment, decree or order of the probate court, rendered in term time, within twenty days from the date of said judgment, decree or order; executors, administrators and guardians, and the attorney for the State, may appeal without security.

"Section 2 of this act, in the compendium of powers which the probate court shall have either in term time or vacation, recognizes the power 'to approve or disapprove of claims acknowledged by an executor, administrator or guardian.'

The substance of sections from 13 to 16, inclusive, is to provide the manner in which a claim for land, etc., shall be

verified before presentation. If rejected by the administrator or if accepted by him and disapproved by the judge, the owner may institute suit, according to jurisdiction, in another court.

"If, on the other hand, a claim for land, &c., shall be both accepted by the administrator and approved by the judge, any party in interest – *i. e.*, creditor or heir of legatee – may appeal to the district court.

"It is an elemental rule of construction that effect is to be given, if possible, to the whole instrument or statute and to every section and clause.

"Cooley says (Constitutional Limitations, p. 58): 'If different portions seem to conflict the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative rather than one which may make some idle and nugatory.'

"Unless the construction we have given to the act of 1846 is correct, section 13, so far as claims for land are concerned, would be idle and nugatory.

"In the light of the history of Texas and Texas lands, of which we must take judicial notice, it seems clear that if the legislature intended to and did repeal the act of 1846 in regard to power of the probate court to set off undisputed claims for land, it must have been intended to give the necessary power to the probate court, constituted under the act of 1846, as otherwise confusion, litigation, and delay would result in the settlement of successions.

"Considering the act of 1846 with reference to the other powers and jurisdiction conferred upon the probate court and

giving effect, if possible, to the whole law and every section and clause, the construction we have given the act of 1846 seems necessary. Section 2 of said act fully authorizes and empowers the probate court 'direct the partition of the property of estates.' This power could not be exercised with much effect or practical good unless the same court had the power to set off to others than heirs undisputed claims for land."

In reference to the case of Matthewson vs. Sprague, 1 Curtis, (C. C. R.,) p. 457, and Harris vs. Hardman, 14 Howard, 334, and Godfrey vs. Terry, 97 U. S., 171, cited on page 15 of petitioner's brief, assuming that they decide the point as stated by petitioner, we submit that they merely announce the same well established principles of law to be found in Galpin vs. Page and Thatcher vs. Powell, supra, and the same remarks above with reference to those cases, apply to these cases of Matthewson vs. Sprague and Harris vs. Hardman, and Godfrey vs. Terry.

6. In reference to the decisions of this court and of certain state courts, in the case of Steamer Harrisburg vs. Rickards, to be found on page 19 of petitioner's brief, and Pulliam vs. Pulliam, 10 Federal Reporter, 76, and cases following, and in Campbell vs. Holt, 115 U. S., 620, (all to be found on page 20 of petitioner's brief,) we submit that the principles there announced have no direct bearing upon any points expressly decided by the Circuit Court of Appeals, and we further submit with reference to those cases, that, in so far as any of them hold that a new right, independent of common law, conferred by statute, on condition that action shall be

brought within a specified time, is lost and forever waived by failure to bring action within such time, this principle we fully recognize; and in reference to any of such cases as hold that when the statute prescribes the time when such action shall be brought against an estate, such time constitutes a statute of limitation; we also recognize the same as announcing sound law. In this case, however, if by citing these decisions, or any of them, petitioner seeks to establish that the statute prescribing the time within which claim shall be presented against an estate, wherein the rights are not originally given by said statute, but exists at common law, that such statutes are of the essence of the right itself, and not mere statutes of limitation and repose, we submit that none of such decisions bear out petitioner's contention — that such statutes are merely statutes of limitation and repose, has been expressly decided in Texas by the following cases:

Graham vs. Vining, 1 Texas, 639.

McDougal vs. Hadley, 1 Texas, 490.

Gautier vs. Franklin, 1 Texas, 732.

Graham vs. Vining, 2 Texas, 433.

The filing of any such claim within the time prescribed by any such statute is not of the essense of the jurisdiction of the court, nor of the *right* in the claims; and the question as to whether or not the statute of limitation could have been interposed by any person in 1847 certainly cannot by the authority of any decisions cited by petitioner, be now collaterally raised, after the lapse of forty years' acquiescense.

Authority:

Martin vs. Robinson, 67 Texas, 369.

Now, giving our attention to the alleged want of harmony between the decisions of the Circuit Court of Appeals and certain decisions of the Supreme Court of Texas, cited in petitioner's brief, and relied upon by him in his fourth assignment, we beg to submit that the decisions cited range themselves into four classes. The classes are: (1) those decisions relating to the implied repeal of the statute by a subsequent statute; (2) those supposed to construe sections 13, 14, 15 and 16 of the law of May 11th, 1846, and denying power to the probate court under said sections, to decree specific performance of executory contracts of a decedent to convey land; (3) those decisions upon the subject of presumptions, to be indulged on collateral attack in favor of the proceedings of courts of limited and special jurisdiction; and, (4) those decisions construing the statute of limitations concerning the presenting of claims against the administrator, executor or guardian of an estate. In our opinion, an examination of all of the cases will show that the want of harmony alleged by petitioner, does not, in fact, exist.

In the case of Lewis vs. Ames, 44 Texas, p. 350 (page 10 of petitioner's brief,) it was decided that Section 17 of the act of 1846, divested, by implication, the probate court of power to appoint guardians *ad litem* upon citation by *publication*, as provided for in the act of 1840, because the provisions of said section 17 required *personal* service on heirs or legatees, or, if minors, on their representatives; from which it will be seen that the court is only speaking of the repeal of that particular phase of the law of 1840, concerning the service of citation, and such decision is clearly sound upon the doctrine of implied repeal often announced by this court and

the Supreme Court of Texas, that when a subsequent law is intended as a complete and entire substitute for a former law, the former law is thereby repealed by implication.

And in the case of Bryan vs. Sundberg, 5 Texas, p. 424; Rogers vs. Watrous, 8 Texas, p. 62, and Camley vs Stamfield, 10 Texas, p. 549, to be found on page 11 of petitioner's brief, are all to the same effect as Lewis vs Ames, 44 Texas p. 350, the first of which last mentioned cases simply decides that the act of 1846, providing that the assessors and collectors of taxes shall receive in payment of all taxes and revenues imposed, all coins made current by the laws of the United States, and the exchecquer-bills of the Republic of Texas, by necessary implication repealed the prior act of January 18th, 1843, making certificates issued, agreeably to the provision of the law of 1843 receivable for all dues of the government; and which certificate the petitioner in that case attempted to pay his taxes with in 1847.

And in the case of Rogers vs. Watrous, 8 Texas, p. 62, the law of 1843 permitted the judge of the district court to grant a change of venue on a mere motion of an attorney; but the constitution of 1845 required the legislature to provide laws which would govern the change of venue in certain cases; and by the act of 1846, it was provided, in pursuance of the constitutional requirement, in event the district judge should be disqualified, he should exchange with another district judge, or that a special judge should be appointed. Says the court in that case: "The provision of the constitution which we have cited, evidently contemplates a revision by the legisture of the law upon the subject of change of venue. The provisions of the statute referred to contain such revision as

respects cases in which the judge is interested, etc., and they seem to have been intended to provide for that entire subject matter, and to supersede all former laws on the same subject."

And in the case of Camley vs. Stanfield, the act of 1840 gives justices of the peace the right to try cases for the possession of real estate, but provides that "the estate or merits of the title shall not be brought into question." (Article 1767 of Hartley's Digest.) In 1848, by the act of that year, (Hartley's Digest, p. 449,) the act of 1840 was re-enacted in terms, except that it omitted entirely the provision that the "estate or merits of the title shall not be brought in question." Says the court in that case: "The latter act being a re-enactment of the former act, with the exception noticed, it is believed to have superseded that act, and that the exception is no longer a part of the statute regulating such trials." The cases, therefore, above cited, we respectfully submit, not only from the very points involved therein, but upon the expressed principles upon which the decisions are rested, by the courts, show that they have reference to points entirely different from that decided by the Circuit Court of Appeals, and do not bear in any way upon the point so decided, to-wit: the effect of a repealing clause in a general statute, upon a separate and independent statute referring to a special and particular statutory power not necessarily embraced within the subject matter of the general statute, and in no way repugnant to, or in conflict with, the provision of the general statute,

In reference to the case of Jones vs. Taylor, 7 Texas, p. 240, and cases following, cited on pages 12 and 13 of petitioner's brief, an examination of the same will show as follows:

In Jones vs. Taylor, the question involved is only as to the requisites of an order of court under the law of 1848 (Hartley's Digest, section 1162) giving power to an administrator to convey land of the estate. It is conceded there that the court had such power, and the only objection is that the order in question under which the particular deed was made, required the administrator to execute titles to all lands to which the estate of the deceased stood bound by executory contract; and the court said that the order was too comprehensive, and was not such as was authorized by the statute; but so far from holding, as contended by petitioner, that the court had no power to make an order for the conveyance of real estate, the court expressly says that the power existed, but, being special and limited, must be strictly pursued. And in the case of Booth vs. Todd, 8 Texas, p. 137, so far as from holding that the court had no power to decree specific performance of executory contracts of decedents to convey land under the statute then in force (Hartley's Digest, 1162) it is expressly said: "There is, perhaps, but one case in which litigation on a claim against the deceased is conducted before the probate court, and that is for the enforcement of executory contracts to convey title to lands," (citing Hartley's Digest, section 1162). The claim in question was upon a money demand, and not upon an executory contract for land. And in the case of Peters vs. Phillips, 19 Texas, p. 70, is also a construction of the same articles of Hartley's Digest (article 1162), and the court merely states that the jurisdiction over the subject matter, to-wit: the enforcement of a contract to convey land, is special, and can be only exercised where there is a bond or agreement to make title, *in writing*, but expressly decides

that under the act of 1848 the power in question was clearly conferred, and held that the particular bond in question—the only point involved in the case—was sufficient to confer the jurisdiction to decree a specific performance against the estate of a decedent, of the contract in writing to convey land.

And Hooper vs. Hall, 30 Texas, p. 154, was a case of an order of the probate court, made in December, 1842, under the act of 1840, and of course, prior to the Act of 1844, which latter was the first statute to confer the jurisdiction upon probate courts to decree specific performance of executory contracts to convey land. The order of 1842 was made in pursuance of the law of February 5th, 1840, which gave the probate courts authority to order the partition of lands held in common by the succession and the applicant for such partition; but did not confer jurisdiction in cases for specific performance of contracts or to hear and determine upon the validity of lands or other imperfect titles; and it was not until the passage of the act of February 2nd, 1844, that the court was invested with that power. In that case, the parties sought to introduce the order of 1842 in evidence as a muniment of title, but it was held by the court, so far as that order was relied upon as having that effect, that the objection was well taken. And in the case of Houston vs Killough, 80 Texas, p. 296, it is merely decided that the power in the probate courts to decree the specific performance of executory contracts to convey land never existed in Texas unless expressly conferred by statute; that the act of February 2nd, 1844 seems to have been the first act that conferred power of that kind, and then, only in the case in which application was made by an executor, administrator or guardian, and when it was made to

appear upon satisfactory evidence that a compliance with the requirements of said bond, obligation or contract would be beneficial to the interests of said estate, and that the act of March 20th, 1848, seems to have been the first law which permitted the holder of a contract to convey land to have specific performance through a decree of the probate court. From the fact that the particular order involved in the case of Houston vs. Killough, was made some time between September 31st, 1838, and February 28th, 1842, and therefore could not involve an examination of subsequent statutes; the utterances in Houston vs Killough, as to the effect of subsequent statutes are *obitor;* the said court does not positively state what law was the first to confer power upon the probate court to decree a specific performance of an executory contract to convey land upon the application of a holder of such contract. On the contrary, the language of such decision is that the act of March 20th, 1848, *seems* to have been the first law; whereas, by the decision of this case of the lower court, and of the Circuit Court of Appeals, it is positively decided that sections 13, 14, 15 and 16, of the act of May 11th, 1846, did confer such power. In Houston vs. Killough, the point was not in issue, and the language of the court is not positive, but it is purposely undecided; whereas, in this case, the point was in issue, as is clearly borne out by the lanuage of the statutes and the reasoning of the court, and is for the first time positively, emphatically and authoritatively decided. It seems to us that this constitutes no want of harmony between the decision in this case and that of Houston vs. Killough.

In reference to the above decisions last examined, we therefore say, for the reasons pointed out, that they do not

support the contentions of petitioner in his fourth assignment of grounds why his petition should be granted.

In reference to the cases of Wise vs. O'Malley, 60 Texas, p. 588, and other decisions of the Supreme Court of Texas, on page 12 of petitioner's brief, we submit that they do not support his fourth assignment. The case of Wise vs. O'Malley, upon investigation, will be found to be a decision construing the statute of 1879, in which it is decided that under such statutes, a suit for a money demand could not be brought in the probate court, but that only suits for the specific performance of executory contracts could be brought there, in which it is consistent with the case of Booth vs. Todd, 8 Texas, *supra*. And the case of Glascow vs. McKinnon, 79 Texas, p. 116, is practically to the same effect as Wise vs. O'Malley and Booth vs. Todd, but construes certain articles of the statutes of 1879 and holds that the jurisdiction of the probate court under articles 2132, 2570, 2571, 2572 and 2642, of the Revised Statutes of 1879, to decree the sale of a minor's land, cannot be brought into exercise upon an application to sell an entire tract for the purpose of partition, for the reason that the power of such court to decree a sale, is limited by the statutes to certain enumerated cases, and the purpose of a sale for "partition" is not one of the purposes enumerated.

Mayo vs. Tudor's Heirs was a case in which a party died, leaving 640 acres of land, in fact community property, devising the same to his wife for life, the remainder to his son Virgil. The son, Virgil, died in 1857, leaving a daughter, Mary, and a widow, Julia, which widow afterwards intermar-

ried with one R. P. Mayo. The wife of the original decedent, I. Davis, died in 1868, and attempted to dispose of the 640 acres, devising 320 to Mary, the daughter of Virgil, deceased. In this case it was simply held that the probate court, under the act of 1870, did not have power to pass upon a question of title to the real estate; and that the power was a part, as it always had been, of the ordinary jurisdiction of the district court, and therefore that the effect of a decree of partition in said probate court under which Mary Davis, the daughter of Virgil, accepted one-half of the 640 acres, did not preclude her from thereafter setting up title to the whole or any portion of the other 320 acres.

In the case of Withers vs. Patterson, the only question directly involved is the effect of the appointment of an administrator and the subsequent sale of lands of an estate after the final discharge of a prior administrator and the termination of the administration. In this case, it was held that such prior discharge and termination of the administration divested the probate court of further jurisdiction over the estate, and that the subsequent appointment of an administrator, and orders made in the process of such administration, were null and void, because *coram non judice*. Withers vs. Patterson, one of the leading cases in this state, and an everlasting monument to Judge James H. Bell, who delivered the opinion, is one of the finest expositions to be found anywhere, upon the doctrine of presumptions to be indulged on collateral attacks in support of the acts of courts of special as well as general jurisdiction. But in none of these cases can we find that want of harmony complained of by petitioner in his fourth assignment. As far as any of the cases above referred to hold

that power to decree specific performance of executory contracts to convey land must be expressly conferred by statute upon probate courts, and that unless such contracts were in writing the power does not exist; or holding that the probate courts of Texas can exercise no power except what is expressly given to them by statute, we have to say that there is therein no want of harmony between the decision of the Circuit Court of Appeals in this case and in such decisions. The point is in no way involved. It has expressly been found by the said Circuit Court of Appeals, and supported by a reference to the statutes, that the power in question in this case had been expressly conferred. On page 13 of petitioner's brief, he again refers to Hooper vs. Hall, 30 Texas, p. 157, and attempts to show that it has some bearing on this case, but we again call attention to the fact that the court was then only construing the effect and legal consequences of an order made in 1842, under the act of 1840 which did not confer power upon the probate courts of Texas to decree specific performance of executory contracts to convey lands, which power was only for the first time conferred by the act of 1844. In that case, the court merely held that such order, for the reason that the court *then* had no power to pass upon a question of title, could not be used as a muniment of title. It has no bearing, however, upon an order made in 1847, after the passage of the act of 1844, and under the act of May 11th, 1846, and we cannot see how it in any way can be in want of harmony with the decision of the Circuit Court of Appeals construing an act of the probate court made in 1847.

In reference to the Texas cases referred to on page 15,

of petitioner's brief, we submit that they do not support petitioner's fourth assignment. In so far as they announce the doctrine that when a court exercises an extraordinary power, under a special statute which prescribes its course, contrary to the course of the common law, and in a summary manner, although it be a superior court in other matters, in the particular case it is a court of limited jurisdiction, and all facts essential to its jurisdiction must affirmatively appear on record, the said cases announce a sound and well established principle of law, but we cannot see how any such decisions in anyway lack in harmony with the decision of the Circuit Court of Appeals, in which it is especially stated as we have heretofore said, that the jurisdictional facts authorizing the court to proceed under the statute of 1844, conferring special and extraordinary powers, affirmatively appear by the record to have existed; and, in fact, said court says that it appears by the record that the proceedings were had under the provisions of said act, in which said court is clearly borne out by the record, (see page 22-23,) and the said court, in holding further, that the power in question existed under sections 13, 14, 15, and 16, of the act of May 11th, 1846, expressly calls attention to the fact that all of the pre-requisites esential to the power conferred by said sections, affirmatively appeared by the record to have existed in this case, and the same is supported by the record aforesaid.

An examination of the cases to be found on page 15 of petitioner's brief will disclose that they have no more bearing upon this case than the other cases cited by him. The only point having any relevancy to this case is the decision in Mills vs. Herndon, 60 Texas, 353, to the effect that the order

of the probate court made in 1848, under which one of the parties claimed title was somewhat defective, and in reversing the case, and remanding the same for a new trial, the following application of universally recognized law is to be found: "Owing to the defects in the record, as heretofore suggested, it is sufficient for the purposes of this appeal, to say that if upon another trial, it does *affirmatively* appear from the record that the jurisdiction of the probate court did *not* attach in this particular, then the proceedings must be considered as void and subject to collatteral attack in this case." The case of Wise vs. O'Malley, heretofore examined, merely announces that the jurisdiction of a probate court to establish claims against an estate does not exist unless the contracts or claims are executory in character, and that the jurisdiction of said courts is limited and special; and the suit in question being upon an executed contract, would under the act then in force have to be *established* in some other court. It was not even, however, a claim for land, but a plain suit for salary.

And in the case of Mayo vs. Tudor's heirs, already examined, as we have seen, the only question bearing upon this case which was there involved, was as to the effect of an order of the probate court decreeing partition under the act of 1870, upon the question of title; such court having no jurisdiction under such statute, to adjudicate questions of title; it was there held that a party accepting under such partition was not estopped to set up a superior title against partitioners.

And in the case of Brown vs Wheelock, 75 Texas, 385, was a construction of a special statute of 1879, conferring upon the *judge* of the district court, but not upon the court, the

power to decree removal of the disabilities of a minor of certain age, in a summary and special manner there marked out, and the only principle involved was that universally recognized one, that in such cases the power of the judge, or court, had it been conferred upon the court, was special and limited, and on collatteral attack, jurisdictional matters should affirmatively appear of record in order to support the action of the court

In the case of Peters vs. Phillips, 19 Texas, p. 70, it is held that the power to decree specific performance of an executory contract to convey real estate against the estate of a decedent, was special and limited, and that it was necessary to the existence of the power, among other things, that the contract should appear to have been in writing; and Houston vs. Killough, 80 Texas, 296, so far from bearing out the proposition stated in petitioner's brief, the court in that decision uses the following language: "There being no grant of power to the probate court until February 2nd, 1844, to decree a specific performance of executory contract of decedents to convey land, it follows that it did not exist at the time that the court below found that such a decree was entered. This court would presume that such a state of facts was shown as authorized such a decree as the court below found was rendered, if the jurisdiction of the court was shown, but, in the absence of jurisdiction, whatever might have been the equities between the parties, the decree binds no person or thing," in which respect we say the decision was far from supporting the proposition of petitioner, and announces a principle that, even in courts of such limited and special power, presumption will be indulged on collateral attack in favor of the exer-

cise of their jurisdiction. But, for this princip'e, we do not deem it necessary to contend in this case; although we take it to be established law in Texas, concerning the action of probate courts, in ordering the sale of the realty of an estate.

Authority:

Alexander vs. Maverick, 18 Tex., 179, and 67 Tex., 369.

Norris vs. Duncan, 21 Texas, p. 594, was a case where the executory contract in writing produced in the probate court in 1849 was for 75 acres, and it appeared that the applicant proved a verbal contract with decedent for 25 acres more, and the order therein was for a specific performance of the contract for 100 acres. The law in force at that time (Hartley's Digest, 1162) only gave the court power in such cases where the contract was in writing, and the court there held that, as to the 25 acres the contract for which was established by parol, the order was null and void. But in this case, we wish to call attention to the fact (not for the purpose of contending that the principle of law contended for in petitioner's brief, is not correct, but simply to show that this case does not bear him out, and has no application) that this was a direct attack, by the heirs by certiorari, and was not by any means a collateral attack.

In reference to the propositions of law cited upon page 16 of petitioner's brief, to the effect that where special powers are conferred upon a court, either of general or limited jurisdiction, in cases where the court proceeds in a summary manner, and not according to the course of the common law, jurisdictional facts, on collateral attack, must affirmatively appear of

provided that claims, therein referred to and which, we contend, did *not* include claims such as is involved in this suit, should also be presented within twelve months from the grant of letters testamentary or of administration; but the failure to so present them resulted only in the postponement of their payment until those presented should have been paid, but they should not be finally barred except by the general laws of limitation (article 1104 of Hartley's Digest). Said article is in language as follows:

"Art. 1104. Be it further enacted that the owners of claims which have been presented, acknowledged and approved, or which have been established by judgment, shall be entitled, in the following order, to a full or a pro rata payment at the sixth regular term of the court, after granting the letters: first, funeral expenses; second, debts due the late Republic of Texas; third, debts due the government of the United States; fourth, taxes assessed for the State; fifth, recorded mortgages and liens on specific property, then judgments of the courts of this State, the oldest first; sixth, all other debts,—and debts not due after deducting a discount of legal interest, shall be classed and paid as debts that are due; claims in suit shall be taken into the pro rata estimate, and claims not presented within twelve months from the publication of notice, shall be postponed in their payment until those presented have been paid; they shall be *finally* barred, however, only by the general law of limitations."

A reference to said article shows that it only contemplates money claims, and that there is no provision limiting the time in which claims for the specific performance of executory contracts for the conveyance of land should be pre-

sented. But, without pursuing this discussion any further, we submit that the cases above referred to on page 18 of petitioner's brief, including the case of McDougle vs. Smith's Executors — a certain portion of the language of which is quoted by petitioner — all have reference to money claims presented against the estate under the act of 1840, which claims were resisted, among other grounds, because they were not presented within the time prescribed by the act of 1840.

Now, in this case, it nowhere appears upon the record that any plea of the statute of limitations, even if it had been applicable, had ever been interposed in the probate court of 1847, and no appeal had ever been taken therefrom, but the same had been acquiesced in for over forty-five years by all interested in the estate; and we now submit that it is incompetent in a collateral attack, and especially at this late day, to raise the question. The statute of limitations nowhere, by the requirement of any statute in force in 1847, operates upon the *jurisdiction* of the court to act in such cases; and if the right to interpose the plea existed at all, it simply existed as a matter of defense which might be waived, and could only be availed in the original proceeding, by direct attack. (Martin vs. Robinson, 67 Tex., 369.) Besides, while we think that the view that we suggest is a complete answer to the objection made by petitioner, we submit that this question is in no way in response to the assignment contained in his fourth ground as to why the writ prayed for should be granted, to-wit: that the decision of the Circuit Court of Appeals is not in harmony with the decisions cited by him.

In conclusion, petitioner pathetically calls attention to the fact that he earnestly believes that he has a meritorious case, and that his mother when a helpless infant, was defrauded of her sole inheritance, but fails to call attention to the fact that his mother was of marriageable age on the 24th day of February, 1854, and that she died November 7th, 1868, leaving surviving her husband, and the petitioner, the plaintiff in this cause, who was born on December 11th, 1854; that the husband of petitioner's mother being the father and natural guardian of petitioner, was able to protect and look after the rights and interests of petitioner and his mother in 1854 and 1868; that petitioner himself reached man's estate on December 11th, 1875, and that he acquiesced in these rights for over seventeen years and two months, and only files suit on the 15th of February, 1892. After the land in controversy had been occupied for a number of years, and after purchasers had relied upon the titles and the proceedings of the probate court in 1847, for forty-five years. While, of course, we are aware that the doctrine of stale demand has no application in a suit at law, we only make this suggestion and refer to the record in support of our assertion. (See record, p. 11) in answer to the wail of petitioner, appealing to the sympathy of this court.

Petitioner, presented the very questions involved in his application, to the Circuit Court of Appeals, on his request for a certificate. He had already applied for a re-hearing and while perhaps the doctrine of *res-judicata*, does not strictly apply, we submit that, in the interest of justice, and in furtherance of that finality of the action of the Circuit Court of Appeals, so manifestly sought to be accomplished by the act

of March 3, 1891. the petitioner ought, by having submitted, the very questions here involved, to the determination of the Circuit Court of Appeals, be now precluded from further persistence in this expensive and vexatious litigation by the express finding of said Circuit Court of Appeals, to the effect that this controversy only involves a "question of title to land and is purely local." *Interest reipublicae ut sit finis litium.*

Petitioner has pursued defendants from court to court, from term to term, at great cost to them, and ever since the filing of his suit has rendered their property in controversy, unmarketable because of the heavy and threatening cloud on its title, created by his suit. He has already forced them to go from their home, to a distant forum, at great expense, and now he seeks to force them, to go 2,000 miles away at further and positively burdensome cost and hopes to have his case docketed for trial on its merits, on the docket of this court, thereby intensifying the cloud on defendants title by which he will be enabled to threaten it for several years to come.

For the reasons set forth in this second part of defendants' brief, as well as in the first part thereof, defendants show that the relief prayed for by petitioner ought to be denied, and they pray that the application for the writ of certiorari be therefore refused, as in duty bound they shall ever pray, etc.

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Attorneys for defendants

October 1st, 1893.

Office Supreme Court U. S.
FILED.
OCT 23 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

ROBERT F. ASPLEY
vs.
J. P. MURPHY *et al.* } No. 953.

PETITION FOR CERTIORARI, ETC.

Supplemental Brief for Petitioner.

It appears in the papers in this cause, property of vast value, not short of $6,000,000, is involved in this litigation, and a great many persons are directly interested in the result; this property being immediately at, and these persons mostly citizens of, the city of Dallas, Texas, a beautiful and progressing city, with all the "modern improvements," numbering not less that 40,000 people.

The case involving all this was tried in the Circuit Court of the United States for the Northern District of Texas, and decided adversely to this petitioner, and he carried it to the Circuit Court of Appeals for the 5th circuit at New Orleans, and there it was affirmed; a motion for rehearing was filed and overruled; request was made to that court to certify the case to this court, and that was refused; an appeal to this court was asked and it was

refused, and now petitioner, as his last hope to have reviewed the very *grave* questions involved in this very *important* suit, asks this court to have it brought here for review and final determination

It will be seen, therefore, at once, that no coercive measure is here asked for, such as mandamus to grant an appeal, but the more decorous one, a certiorari, is applied for, though it is by no means certain an appeal would not lie.

The 6th section of the act establishing Circuit Courts of Appeals (26 Stat., p. 828) provides, among other things, in substance, *that any case in which the judgment of the Circuit Court of Appeals is made final, may be required by this court, by certiorari or otherwise, to be certified to it for review and determination, as if it had been brought here on appeal or writ of error, etc.*

This is done after the act undertakes to define or specify what cases may be brought here by appeal or writ of error, and after giving the right to the Circuit Court of Appeals to ask for light itself in cases. In this regard, then, the act would seem to say, now, nothwithstanding this right of appeal or of a writ of error, and this right to certify by the court itself, if any case finally decided in those courts deserves review and determination here, this court may bring it here, review and determine it. No attempt at definition or classification of cases to be thus brought here is made in this act, and no elements are given by which this court is to be guided in passing on the question of review; but it seems this court is left to say what kind of a case can be decorated by or with a review. Thus far in giving metes and boundaries to this vast field of reviewing jurisprudence, we have only advanced positively to questions of *gravity* and *importance* to be thus reviewed (*Lau Ow Bew, Petitioner, 141 U. S., 587*). There we stood for a while, but soon judicial inquiry, being restless and progressive, made an advance,

and these strong words began to be mixed up, if not contaminated with others, such as *great gravity, peculiar gravity, public importance, general importance, great public importance, controversies involving weighty and serious matters, etc.* (*148 U. S., 372; 143 Ib., 202.*)

The land mark fixed in the first cause after the passage of the act (141 U. S., *sup.*) has thus been strayed away from, and others, to some extent, put up in its stead. And the brief resisting this application indulges in many qualifying or disqualifying expressions (as the case may be) touching this right of review. And one error patent in it, is the averment that this court has excluded from its estimate of *gravity* and *importance* the amount involved in the suit, and the cases cited to support this fail to do so. It has no place or name in *Lau Ow Bew's case, 141 U. S.*, and it had not in *Fabre's case*, passed on at the last term of this court, and referred to in *148 U. S., 383*, as that was an admiralty case and raised no question as to value or amount involved.

Let it be admitted that the cases in which *certiorari* has been granted by this court under the act involve questions of *gravity* and *importance* with all the *qualifications* or *disqualifications* above noted, there is nothing, whatever, in them to war upon and defeat the application here and now made—nothing

And it is further admitted, that whether a dismissal of a suit is a bar to another suit on the same cause of action, in Minnesota, and what are the rights of a servant as against his master, claiming damages for injuries received in his employment, for, all told, $4,000, in that State, do not properly come under this jurisdiction. (Wood's case, 143 U. S., 202.) But that is not this case, and it is respectfully submitted it can form no precedent hostile to this petition. But we find creeping in and cropping out in these cases other expressions of moment, qualifying or disqualifying, that deserve close consideration

now, and direct application in this proceeding, viz., "*in the interest of jurisprudence and uniformity of decision*" (quoting from the learned legist who had legislative charge of the Circuit Court of Appeals bill), *143 U. S., 206*, "*to arrest diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters;*" (*Ib.*)

The supervision of this court is secured, under this act, "*in the interest of jurisprudence and uniformity of decision*" (*148 U. S., 269*), and "*or in order to secure uniformity of decision.*" (*Ib., 383.*)

The petitioner went into the Circuit Court of the United States to enforce his rights, and in that proceeding he was under the protection of the United States laws, and not hampered and hedged in by State laws merely, only in so far as the United States Court there chose to recognize them operating as State laws upon property held in the State. He was first confronted by an alleged judicial proceeding in a Texas Probate Court, enforcing specific performance of a contract. The mentioning of specific performance of a contract carries with it, in all judicial parlance in this country, the idea of the exercise of equity powers and jurisdiction. (*Adams' Eq., 77–92; Morgan* v. *Morgan, 2d Wheat., 290.*)

It may be said to be almost an anomaly to vest courts of probate with this jurisdiction—courts, in short, having the business of settling estates, etc., to look after. In the long list of special matters, pertaining to administering estates confided to them by our authors, we fail to find this jurisdiction named, and the presumption is flatly against it. (*Brown's Jurd., Sec. 130, and notes.*)

Is it not, then, at once a very *grave* and a very *important* question whether that jurisdiction existed, and whether it was so enforced in this affair as not to prejudice a suitor in the United States Court; and does it not become a question in the general domain of jurispru-

dence as distinguished from a mere local one affecting parties only within the jurisdiction of State courts? It can not be worth while to burden or vex this court with a discussion touching the creation and organization of Federal courts, to show that this comes, in part, within the very reason given by the framers of the Constitution for having those tribunals in the States.

Then arises the question as to the repeal of the law giving this head of equity jurisdiction to the probate court! Questions as to construction and repeal of statutes, their effect, their operation, prospective and retroactive, are not local, or such, as decided by the State courts, are binding on the United States courts. These are questions to be tested and determined by rules settled and agreed on long, long before our States existed, and they are questions for judicial determination in each particular tribunal where presented. A State court may say a statute is repealed or is not, but that settles not the question in the Federal tribunal. (*U. S.* v. *Claflin, 97 U. S., 546; Burgess* v. *Seligman, 107 U. S., 20; note 1, p. 34.*)

While this court would feel inclined to follow the State decisions, if they knew them and they were uniform, yet these decisions are, by no means, binding on this court. (*Clark* v. *Bever, 139 U. S., 116–117.*) Can there be a *graver* or more *important* question in itself, regardless of what is involved in value, raised than these two? And unless the court is ready to surrender that independence of the Federal tribunals spoken of in *107 U. S., Sup.*, these questions must be reviewed and determined here. But it is apparent Texas decisions themselves are not altogether in harmony and accord on these points (see brief accompanying the petition). While it is true the Court of Appeals denying the appeal in this case said it did agree with the Circuit Court in its judgment, yet we find this question termed "purely local" enveloped in mist and confusion in the State courts and the decisions

conflicting, but a majority of which, we contend, favoring our view of it. Here, then, we invoke the necessity of that "*uniformity of decision*" emphasized so plainly by this court in the several cases already cited. It is needed right here and now. With this jurisdiction conferred on it by the act of March 3, 1891, the court can not afford to hold up its hands and dance attendance on the State tribunals, as it did several times in the noted case of *Post* v. *Supervisors, etc.*, and some others that might be named. To avoid just such unseemly sights we are told, in language that can not be mistaken, this reviewing power was given this court.

The assertion that the act giving this review is confined to differences between Courts of Appeals of different circuits, is a pure begging of the question; it is not to be gathered from the language of the act—it is not to be gathered from the language of any decision yet made upon the act. The act was manifestly intended to make uniform and certain, as far as could be, the decisions in all cases, and from all courts, in which Federal jurisdiction was or could be called on to act.

How many cases are *graver* or more *important* than this, if we consider the amount involved? Or if we consider the number of parties concerned? How many cases can be found involving *graver* or more *important* questions in themselves than are here presented?

In what cases or questions can it be more *important* to have *uniformity of decision* and to avert *diversity of judgment*, and guard against *inadvertence of conclusion* than in these? And how often do we really come across a case involving matters more *weighty* and *serious* than this?

And in the *interest of jurisprudence*, general and at large, not local, we appeal to this court to review this case and to make harmonious and certain those *grave* and *important* questions that affect and control rights in all

the States, enforceable by State courts and by United States courts.

And reiterating the propositions contained in the first brief (accompanying the petition), it is asked this be considered as supplemental thereto; and the case is respectfully submitted.

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